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No. 93-6188

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

1. Whether a federal court may "recharacterize" a state prisoner's action under 42 U.S.C. § 1983 for money damages as a petition for habeas corpus and, on that basis, require the prisoner to exhaust state habeas corpus remedies before seeking to vindicate his constitutional rights under Section 1983.

2. Whether a federal court that requires exhaustion of a Section 1983 action for money damages on this basis should stay, rather than dismiss, the Section 1983 action pending exhaustion.

RULE 14.1 STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Robert Ewbank, Attorney
Michael Krinoph, Indiana State Police Investigator

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., infra, 1a-5a) is reported at 997 F.2d 355. The opinion of the United States District Court for the Southern District of Indiana (App., infra, 6a-8a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in full in the appendix. See Pet. App. 26a.

STATEMENT

This case arises out of a state prisoner's action for damages under the federal civil rights statutes, including 42 U.S.C. § 1983. The district court recharacterized petitioner's Section 1983 damages action as a petition for habeas corpus, and on that basis dismissed the action without prejudice so that petitioner could exhaust state remedies. The court of appeals affirmed, holding that such recharacterization was proper under Seventh Circuit law and that the district court was correct in dismissing, rather than merely staying, petitioner's Section 1983 action. In reaching the latter conclusion, the court of appeals declined to follow the decisions of four other circuits and expressly acknowledged that its decision "creates an intercircuit conflict" (Pet. App. 5a) on an important and "difficult" issue (id. at 3a).

1. Petitioner Roy Heck is presently confined at the Westville Correctional Center in Westville, Indiana. He is serving a fifteen-year sentence after a jury, on July 30, 1987, convicted him of voluntary manslaughter in connection with the death of his wife, Rickie Heck. The Indiana Supreme Court upheld petitioner's conviction over a dissent by Justice DeBruler. Heck v. State, 552 N.E.2d 446, 449 (Ind. 1990) (reprinted at Pet. App. 9a-17a).

The State's case against petitioner was based on circumstantial evidence. Mrs. Heck disappeared on or about January

6, 1986, at a time when she and petitioner had been living apart and were involved in proceedings to dissolve their marriage. Some nine months after her disappearance, Mrs. Heck's body was found buried on petitioner's farm. The pathologist's report initially reported that no cause of death could be determined; later, it was altered to state that Mrs. Heck's jaw was broken and to "theorize[] [that] the probability was that decedent had died as a result of a severe blow to the head." Pet. App. 11a.

At trial, the State presented testimony from Mrs. Heck's neighbors that, on the evening of January 6, 1986, she engaged in a heated argument with another person outside of her trailer home. At trial, a neighbor of Mrs. Heck was permitted to identify petitioner as the unknown participant in the January 6 argument on the basis of his voice. The neighbor's in-court voice identification was based on the police having played, at her request and only one week before trial, a recording of petitioner's voice, which she then identified as the voice she heard on January 6. Pet. App. 13a. The neighbor, who was "from the Philippines" and "had a very limited understanding and use of the English language," also gave conflicting accounts in her deposition and at trial of what she heard during the January 6 argument. Pet. App. 13a-14a. In dissenting from the Indiana Supreme Court's affirmance of petitioner's conviction, Justice DeBruler concluded that the voice identification procedure employed by the Indiana police was "unduly and unnecessarily suggestive" and created "a very

substantial likelihood of irreparable misidentification." Pet. App. 17a.

2. On December 27, 1988, petitioner, proceeding pro se, filed this lawsuit under 42 U.S.C. §§ 1983, 1985(2), 1986 and 1988. Petitioner's complaint named as defendants three persons who participated in the investigation and prosecution of his case: Dearborn County prosecutors James Humphrey and Robert Ewbank, and Michael Krinoph, an investigator with the Indiana State Police. See Pet. App. 20a. Petitioner claimed that defendants "conspired and/or acted in concert" to subject him to "an illegal investigation" of his wife's death, "in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution." Pet. App. 21a. More specifically, petitioner alleged that defendants (1) conducted an illegal search, (2) arbitrarily, unlawfully, and knowingly "destroyed clothing from [his] deceased wife's body which was exculpatory in nature and could have proved [his] innoc[]ence," and (3) "directed * * * an illegal and unlawful v[oi]ce identification procedure [three] times with a potential state witness." Pet. App. 23a. Petitioner's complaint sought compensatory and punitive damages, declaratory relief, interest, costs, and attorneys' fees. Pet. App. 25a. It did not seek invalidation of his conviction or release from prison. Along with his complaint, petitioner filed an application to proceed in forma pauperis. Pet. App. 18a-19a.

3. The district court denied petitioner's request to proceed in forma pauperis and ordered the dismissal of his Section 1983 action. The gravamen of petitioner's Section 1983 claim, the court

explained, was that defendants had "acted improperly in an investigation culminating in his being charged." Pet. App. 7a. Because "the issue he raises directly implicate[s] the legality of his confinement," reasoned the court, the "exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may be brought only after available state remedies have been exhausted." Pet. App. 7a-8a (emphasis added). See also id. at 8a (stating that "a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement"). Ibid.[1]

4. The Seventh Circuit affirmed. Pet. App. 1a-5a. The court of appeals first agreed with the district court that, under Seventh Circuit precedent, petitioner's civil rights action for damages was properly recharacterized as a petition for habeas corpus. Id. at 3a. Conceding that petitioner was not "explicitly requesting that his conviction be vacated," the court nevertheless explained that

[1] Petitioner also sought but was denied habeas relief in federal court. On June 19, 1990, he filed a petition for relief under 28 U.S.C. § 2254, raising five constitutional claims: (1) insufficient evidence to support a conviction for voluntary manslaughter; (2) use of suggestive voice identification procedure; (3) ineffective assistance of counsel; (4) use of illegally obtained wiretap evidence; and (5) deprivation of a fair trial due to use of hearsay testimony. On January 7, 1991, the district court dismissed the petition without prejudice because petitioner had failed to exhaust his claim that he received ineffective assistance of counsel. Heck v. Richards, No. S90-205 (N.D. Ind.). On January 22, 1991, petitioner filed a second federal habeas petition that was identical but for the omission of the ineffectiveness claim. The district court found that the remaining claims had been exhausted on petitioner's direct appeal, and went on to deny relief. Heck v. Richards, No. S91-40 (N.D. Ind. July 30, 1991). The Seventh Circuit affirmed in an unpublished order. Heck v. Richards, No. 91-3034 (Sept. 28, 1992). Petitioner has never sought post-conviction relief in the Indiana courts.

"regardless of the relief sought," if a state prisoner "is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies * * * ." Ibid. "This is such a case," the court continued, because petitioner "claims that he would not have been convicted had the defendants not violated his constitutional rights." Ibid. "Indeed," the court of appeals added, "if his conviction were proper, this suit would in all likelihood be barred by res judicata." Ibid.

Next, the Seventh Circuit addressed a question that it described as "difficult," namely whether "the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refiling it after he exhausts his state remedies." Pet. App. 3a. The court first acknowledged that under this Court's decision in Owens v. Okure, 488 U.S. 235 (1989), the statute of limitations applicable to petitioner's Section 1983 action is that set forth in Ind. Code §§ 34-1-2-2, 34-1-67-1(6), which provide for a two-year limitations period; that the defendants' alleged misconduct occurred in 1987; that the Indiana statute of limitations "is not tolled by a plaintiff's imprisonment"; and that, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." Pet. App. 3a. "In these circumstances," the court acknowledged,

"several decisions of other circuits hold that the district court should stay rather than dismiss the suit." Ibid. (citing Jewell v. County of Nassau, 917 F.2d 738 (2d Cir. 1990) (per curiam); Young v. Kenny, 907 F.2d 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987); and Richardson v. Fleming, 651 F.2d 366 (5th Cir. 1981)). The court below specifically declined to follow these decisions, however, because staying rather than dismissing the prisoner's action would "give[] inadequate weight to the policy of the statute of limitations, which is to bar stale suits." Pet. App. 3a.

The court of appeals went on to suggest that if petitioner were to exhaust his state habeas remedies, refile his Section 1983 action, and then encounter a statute-of-limitations defense, he might be able to avoid the time bar by invoking the doctrine of equitable tolling. Pet. App. 3a. The panel acknowledged that under Hardin v. Straub, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits," and it acknowledged that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." Pet. App. 3a-4a.[2] Nevertheless, the court of appeals suggested that if a state-law doctrine of equitable tolling were unavailable, a federal court would be obliged to fashion a federal doctrine of equitable tolling

[2] The court did, however, identify one case in which an Indiana court applied what the Seventh Circuit described as "a form of equitable tolling." Pet. App. 3a-4a (citing Torres v. Parkview Foods, 468 N.E.2d 580 (Ind. Ct. App. 1984)).

to effectuate "section 1983's 'chief goals of compensation and deterrence.'" Pet. App. 4a (quoting Hardin, 490 U.S. at 538-39). The court acknowledged that the Second Circuit had come to precisely the opposite conclusion, holding that a federal doctrine of equitable tolling was not available in such circumstances. Pet. App. 4a (citing Jewell v. County of Nassau, supra).

Finally, the Seventh Circuit proceeded to suggest the content of a federal doctrine of equitable tolling applicable in cases such as this:

> The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably untrained in law. If both questions are answered in the affirmative, a third question becomes relevant -- whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies.

Pet. App. 4a. The court "express[ed] no view on the proper answers to these questions in this case," explaining that "that would be premature." Id. at 5a.

Recognizing that its opinion "creates an intercircuit conflict" on the issue of dismissal versus stay, the panel, on its own initiative, circulated its decision to the entire court pursuant to Seventh Circuit Rule 40(f). Pet. App. 5a. Over the

dissenting votes of Judges Cudahy, Ripple and Rovner, the full court decided not to rehear the case en banc. Ibid.

REASONS FOR GRANTING THE PETITION

This case presents two recurring issues of great practical significance: first, whether a federal court may require a state prisoner to exhaust state habeas corpus remedies before litigating his 42 U.S.C. § 1983 claim for money damages; and second, assuming that the answer to the first question is yes, whether the court should dismiss, rather than stay, the prisoner's Section 1983 claim pending exhaustion. Given the enormous volume of prisoner civil rights litigation,[3] it is vitally important that the rules governing cases such as this be clearly established and uniformly applied. In the almost 20 years since the Court has last addressed this area of the law, however, the courts of appeals have "struggled mightily" -- and with a singular lack of success -- to reach consistent results.[4] There are now clear conflicts among the courts of appeals on both issues presented here.

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[3] See 1991 Annual Report of the Director of the Administrative Office of the United States Courts at 179 (Table C-2) (29,645 civil rights actions filed by state prisoners in federal court in year ending September 30, 1992).

[4] Paul Bator, Daniel Meltzer, Paul Mishkin & David Shapiro, Hart & Wechsler's the Federal Courts and the Federal System 1650 (3d ed. 1988). See generally Martin A. Schwartz, The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 85, 87-88 (1988) ("The lower federal court decisions are not surprisingly in disarray, with jurists frequently bemoaning the difficulties and frustrations they encounter in attempting to solve Preiser puzzles.").

By holding that a Section 1983 action for money damages may be recharacterized as a petition for habeas corpus, the court below would force litigants to exhaust state habeas remedies that are wholly incapable of providing the monetary relief they are seeking; not surprisingly, its holding requiring exhaustion cannot be reconciled either with decisions of this Court or with a recent holding of the Second Circuit. And in deciding to dismiss rather than stay petitioner's Section 1983 action -- which will subject the suit to a statute-of-limitations defense upon refiling, will lead to substantial additional litigation, and will prevent the litigation of some meritorious claims -- the Seventh Circuit expressly rejected the conclusions of four other courts of appeals and "create[d] an intercircuit conflict." Pet. App. 5a. Review of the decision below accordingly is warranted.

I. A State Prisoner May Not Be Required To Exhaust State Remedies Before Bringing A Section 1983 Action That Seeks Only Money Damages

In this case, the Seventh Circuit held that petitioner's civil rights action for damages was properly recharacterized as a petition for habeas corpus and, on that basis, subject to the requirement of exhaustion of state remedies set forth in 28 U.S.C. § 2254(b). Pet. App. 3a.[5] Although the decision below recognized that petitioner was not "explicitly requesting that his conviction be vacated," it nevertheless explained that "regardless of the

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[5] The fact that petitioner has included, along with his damages claim, a request for declaratory relief in no way alters the analysis of the recharacterization and exhaustion issue. See Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974).

relief sought," if a state prisoner "is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies * * * ." Ibid. "This is such a case," the court continued, because petitioner "claims that he would not have been convicted had the defendants not violated his constitutional rights." Ibid. In reaching this conclusion, the panel applied settled Seventh Circuit doctrine.

The decision below, however, is flatly inconsistent both with decisions of this Court and with the Second Circuit's decision in Mack v. Varelas, 835 F.2d 995 (1987). What is more, while a number of the other courts of appeals have adopted an exhaustion rule generally similar to that of the Seventh Circuit, most have done so only over vigorous dissents or over the majority's own strong misgivings. Those courts, moreover, have also applied different versions of the exhaustion rule, thereby subjecting state prisoners across the country to different preconditions to having their federal rights determined under Section 1983. And the Seventh Circuit's holding is inconsistent with Congress's intent not to require state prisoners to exhaust state remedies in circumstances such as these. To resolve the conflict with the Second Circuit, and to bring clarity to an extraordinarily muddled area of federal law, further review by this Court is warranted.

A. The Seventh Circuit's Decision To Recharacterize And Require Exhaustion Conflicts With The Decisions Of This Court.

This Court has examined the boundary between habeas corpus and § 1983 in the context of state-prisoner litigation in three cases, all decided in the mid-1970s. See Preiser v. Rodriguez, 411 U.S. 475 (1973); Wolff v. McDonnell, 418 U.S. 539 (1974); Gerstein v. Pugh, 420 U.S. 103 (1975). In discussing the characterization of prisoner claims in those cases, the Court stressed the importance of the type of relief being sought, and it concluded that a state prisoner's Section 1983 claim for damages is immediately cognizable in federal court (and may be pursued simultaneously with a habeas corpus action premised on the same allegations).

Preiser involved a Section 1983 action by state prisoners challenging the calculation of good-time credits by prison authorities. The prisoners "sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement in prison." 411 U.S. at 476-77. Explaining that the very essence of habeas corpus is an attack on the "fact or duration" of confinement, the Court ruled that the prisoners' exclusive federal remedy was an action for habeas corpus. Id. at 500. The prisoners' claim, the Court reasoned, "goes directly to the constitutionality of [their] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." Id. at 489 (emphasis added). See also id. at 498, 500 (same). Thus, the Court's holding turned on both the nature of the prisoners' claim

(a direct attack on the "fact or duration" of their confinement) and the nature of the relief sought in the lawsuit. In holding that habeas was the sole federal remedy available, the Court stressed the federalism concerns underlying the exhaustion requirement of the federal habeas corpus statute and explained that the more specific provisions of 28 U.S.C. § 2254(b) overrode the broader terms of Section 1983. 411 U.S. at 488-90, 493 n.10.

In Preiser, the prisoners argued that requiring exhaustion of state habeas remedies might extinguish a damages remedy under Section 1983, because a prisoner who lost in the state courts would be barred by res judicata from relitigating the issue in a subsequent Section 1983 suit, and this would be true even if "a federal habeas court had later granted him relief on habeas corpus." 411 U.S. at 493-94. In rejecting that argument, this Court explained:

> The answer to this contention is that the respondents here sought no damages, but only equitable relief -- restoration of their good-time credits -- and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release -- the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.

Id. at 494 (emphasis added in part). Preiser thus made unequivocally clear that a claim for damages is, by its very nature, not an attack on the "fact or length" of confinement and is

maintainable in a Section 1983 suit "without any requirement of prior exhaustion of state remedies." Ibid.

This teaching was reaffirmed in Wolff. There, a class of inmates brought suit under Section 1983 for both injunctive relief and damages, contending that (1) prisoner disciplinary proceedings violated due process, (2) regulations concerning inmate mail were unduly restrictive, and (3) the inmate legal assistance program was constitutionally defective. The Court considered each claim separately.

In discussing the plaintiffs' claim that "the rules, practices, and procedures at the [prison] which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amendment" (418 U.S. at 553), the Court took pains to distinguish, at the outset, the various kinds of relief being sought by the plaintiffs: (a) restoration of good time, (b) submission of a plan by the prison authorities for a constitutionally adequate hearing procedure, and (c) damages. "At the threshold," the Court explained, "is the issue whether under Preiser * * * the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U.S.C. § 1983." 418 U.S. at 554. Preiser, the Court continued, had held "that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, with the concomitant requirement of exhausting state

remedies." Ibid. (emphasis added) (citation omitted). But Preiser, the Court continued,

> was careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody.
>
> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under Preiser. But the complaint also sought damages; and Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by Preiser; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

Id. at 554-55 (footnote and citations omitted; emphasis added).

Finally, in Gerstein v. Pugh, 420 U.S. 103 (1975), the Court reaffirmed the critical importance of the type of relief being sought in a prisoner lawsuit in determining whether the suit was properly characterized under Section 1983, habeas corpus, or both. Gerstein was a class action brought under Section 1983 by pretrial detainees who were being held on the strength of prosecutors' informations without a judicial hearing on probable cause. The plaintiffs sought both a declaration that their detention on these terms violated the Fourth Amendment, and an injunction directing

the State of Florida to provide them with a probable-cause determination. The Court observed:

> Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. Preiser v. Rodriguez, 411 U.S. 475 (1973); see Wolff v. McDonnell, 418 U.S. 539, 554-555 (1974).

Id. at 107 n.6 (citation omitted; emphasis added). Having thus indicated, yet again, that the remedy requested in a prisoner lawsuit is dispositive on the question of characterization, the Court proceeded to decide the Fourth Amendment issue on the merits.

In Preiser, Wolff, and Gerstein, then, the Court plainly instructed that the nature of relief sought in a federal lawsuit filed by a state prisoner is the critical factor in determining whether the lawsuit was properly characterized as a Section 1983 action, a habeas petition, or both. This Court also explained that a damages claim was not an attack on the "fact or length" of confinement and thus could be maintained under Section 1983 "without any requirement of prior exhaustion of state remedies." Preiser, 411 U.S. at 494. The general rule that state remedies need not be exhausted in a Section 1983 action, moreover, was subsequently reaffirmed by this Court in Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982). By holding that a prisoner who is seeking damages must nevertheless pursue a remedy in habeas corpus, and must exhaust state habeas remedies before proceeding in federal court under Section 1983, the Seventh Circuit has simply ignored

the clear import of this Court's decisions. To correct that error, this Court should grant further review.

B. The Courts Of Appeals Are In Disarray On Whether A State Prisoner Must Exhaust State Remedies Before Bringing A Section 1983 Action

1. In addition to being irreconcilable with this Court's decisions, the decision below is in clear conflict with the Second Circuit's holding, in Mack v. Varelas, 835 F.2d 995 (1987), that the nature of the relief sought by a state prisoner in a Section 1983 action determines whether the lawsuit may proceed under Section 1983 without prior exhaustion of state remedies. There, the Second Circuit held that a prisoner's Sixth Amendment claim for damages against law enforcement officials -- based on their alleged failure to comply with a court order and produce a witness at his trial -- could not be maintained in a habeas proceeding, but rather only in an action under Section 1983. Reasoning that any damages suffered by Mack were "dependent on a determination of the invalidity of his conviction," the trial court had recharacterized the complaint as a habeas petition and ordered dismissal for failure to exhaust state remedies. 835 F.2d at 997. In rejecting the trial court's recharacterization, the Second Circuit relied on the above-quoted language from Preiser, explaining that "a civil rights action for damages, insofar as it does not also seek to void or shorten the term of imprisonment, is not a challenge that should be made by means of a habeas petition." Id. at 998. See also

ibid. ("Mack's complaint is a civil rights complaint and is not properly characterized as a habeas petition.").[6]

The Second Circuit's approach makes eminent sense. As that court explained, a prisoner's claim for damages -- even if based on an allegation that purportedly "implicates" the legality of his conviction -- is legally and logically distinct from any claim for release:

> Were the present claim essentially a habeas petition, it would be mooted if Mack prevailed on appeal from his conviction; but in fact if Mack were to prevail on that appeal and he were then retried and acquitted, his present claim would not be mooted. * * * Nor would an affirmance of Mack's conviction necessarily negate the basis for his claim for damages, for * * * it is likely that the state appellate court will not reach the question of the propriety of the action or inaction by the sheriffs.

835 F.2d at 998.[7]

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[6] Although the Second Circuit in Mack concluded that "[t]reatment of the complaint as a petition for habeas corpus was * * * not proper, and the case should not have been dismissed for lack of exhaustion" (835 F.2d at 998-99), it concluded that postponement of adjudication (and a stay of the action) was appropriate under the doctrine of abstention, because Mack's direct appeal was still pending at the time the court of appeals rendered its decision and because "one possible outcome of the state court proceedings could negate an essential element of Mack's claim." Id. at 997, 999.

[7] Consistent with Mack, the Second Circuit has in several other cases narrowly construed the boundaries of habeas corpus vis-a-vis Section 1983. See Abdul-Hakeem v. Koehler, 910 F.2d 66, 69 (2d Cir. 1990) (prisoner seeking transfer could sue under Section 1983 because he was not seeking release from confinement itself); Williams v. Ward, 556 F.2d 1143, 1150 (2d Cir.) (Friendly, J.) (prisoner seeking new parole hearing but not requesting release could sue under Section 1983 even though "the relief sought may improve [the prisoner's] chances for parole"), cert. dismissed, 434 U.S. 944 (1977).

That reasoning is squarely applicable here. Petitioner's claim seeks damages for the infringement of his constitutional rights and for time spent wrongfully in jail; that claim will not be satisfied (much less mooted) if petitioner gains his release. Under Mack, then, had petitioner brought his Section 1983 lawsuit in the Second Circuit, his constitutional claims for damages would not have been subject to judicial "recharacterization" as a petition for habeas corpus. There is no reason why prisoners confined in Illinois, Indiana, and Wisconsin should be required to exhaust state habeas remedies whereas those in New York, Vermont, and Connecticut are exempt from that requirement.

2. On the other hand, a number of other courts of appeals, like the Seventh Circuit in this case, apply rules both permitting the judicial recharacterization of Section 1983 damages claims filed by state prisoners where those claims somehow "implicate" the legality of the underlying conviction, and requiring such claimants to exhaust state remedies. See, e.g., Hamlin v. Warren, 664 F.2d 29 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); Meadows v. Evans, 550 F.2d 345, 349 (5th Cir.) (en banc) (aff'g per curiam, 529 F.2d 385 (1976)), cert. denied, 434 U.S. 969 (1977).[8] A

[8] Those courts disagree among themselves, however, about the scope of the required exhaustion. In the Fifth Circuit, for example, a state prisoner whose Section 1983 action is recharacterized as a habeas petition is required to exhaust not only state, but also federal habeas remedies. See Richardson v. Fleming, 651 F.2d 366, 375 (5th Cir. 1981) (directing prisoner to exhaust not only state remedies but also "federal habeas corpus remedies"); Grundstrom v. Darnell, 531 F.2d 272, 273 (5th Cir. 1976) (per curiam) (Section 1983 damages claims could not proceed until prisoner completed "habeas corpus challenge of the conviction pursuant to 28 U.S.C.A. § 2254"). In the Seventh Circuit, as in

remarkable number of these decisions, however, have been issued over sharp dissents. See Hamlin, 664 F.2d at 33-36 (Winter, C.J., dissenting); Meadows, 550 F.2d at 349 (Tjoflat, J., joined by Tuttle, Goldberg, and Godbold, JJ., concurring in part and dissenting in part) (stating that Wolff and Preiser "expressly" and "unambiguously" "laid to rest" the notion that exhaustion doctrine applies in Section 1983 damages suits). See also Fulford v. Klein, 529 F.2d 377, 383 (5th Cir. 1976) (Tuttle, J., concurring in part and dissenting in part) (criticizing majority's rule as "contrary to the language and reasoning of the Supreme Court in [Wolff and Preiser]"), aff'd en banc, 550 F.2d 342 (1977).[9]

Indeed, even those courts that have recharacterized Section 1983 damages claims as actions for habeas relief have expressed serious reservations about whether such a rule can be squared with this Court's decisions. The Eleventh Circuit, for example, has applied an exhaustion requirement, but only because it was bound to follow decisions of the former Fifth Circuit. Gwin v. Snow, 870

many other circuits, exhaustion of state habeas remedies alone is required.

[9] In a series of Eighth Circuit decisions involving challenges to the conditions of confinement or to the denial of good time credits, various judges likewise have argued that Preiser and Wolff mandate a relief-based distinction between Section 1983 and habeas corpus. See Bressman v. Farrier, 900 F.2d 1305, 1309 (8th Cir. 1990) (Heaney, J., concurring and dissenting) (requiring exhaustion of Section 1983 damages claims is "contrary to congressional intent" and "inconsistent with decisions of the United States Supreme Court"), cert. denied, 498 U.S. 1126 (1991); Jones v. Smith, 835 F.2d 175 (8th Cir. 1987) (McMillian, J., dissenting); Offet v. Solem, 823 F.2d 1256, 1261 (8th Cir. 1987) (Arnold, J., dissenting) (majority's holding is "based upon a completely untenable reading of Supreme Court opinions"); ibid. ("I see no other way to read [Preiser]").

F.2d 616 (11th Cir. 1989).[10] In Gwin, the Eleventh Circuit analyzed Preiser and Wolff and concluded that, under those decisions, "the requested relief is the dispositive criterion for determining whether an action can lie under section 1983." Id. at 622; id. at 626 (same). "To the extent that [the Fifth Circuit's] decisions do not allow claims under section 1983 for relief which would not reduce a prisoner's confinement," the Eleventh Circuit declared, "such decisions impermissibly conflict with the Supreme Court's decisions." Id. at 623 (emphasis added).

The Ninth Circuit expressed similar misgivings in Young v. Kenny, 907 F.2d 875 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991), which required exhaustion of a damages claim based on the denial of jail time credits.[11] Writing for the panel, Judge

[10] Gwin is itself inconsistent with a previous Eleventh Circuit decision. Wahl v. McIver, 773 F.2d 1169, 1171 n.1 (11th Cir. 1985) (per curiam) ("Although [the prisoner] complains of the manner in which his conviction was obtained, this suit was properly treated as coming solely under section 1983 * * * [because the] prisoner does not ask for reversal of his conviction * * * .").

[11] This Court denied petitions for certiorari in Young and in Bressman v. Farrier, supra, over the dissenting votes of Justices White and O'Connor. See Bressman, 498 U.S. 1126, 1127 (1991) (stating that "[b]ecause of the confusion and divergence of opinion these issues have generated in the Courts of Appeals, and the fact that this Court has not ruled definitively upon the issues presented," petitions should be granted). Significant differences in the cases, however, make this one a far stronger candidate for review. Young and Bressman involved a different characterization issue from that presented here -- namely whether a prisoner's claim for damages based on the denial of sentence credits (Young), or good-time credits (Bressman), is subject to the exhaustion requirement. Moreover, the petitioner in Young erroneously conceded that there was no division of authority on the characterization issue. See No. 90-5854 Petition for Certiorari, at 7-8 & n.2; 498 U.S. at 1127. As explained in text, however, that concession disregarded the Second Circuit's decision in Mack. Furthermore, the respondents in Young argued that the plaintiff had

Kozinski there explained that the court was "acutely aware" that language in Wolff "appears to conflict with the rule we have just adopted." Id. at 877. See also ibid. ("we * * * are unable to come up with a principled way of distinguishing Wolff"). In fact, the panel in Young explained that it would "feel bound to follow Wolff" and thus to decline to require exhaustion of a state prisoner's damages claim "were it not for a brief excursion made by the Supreme Court at the end of its opinion" in Tower v. Glover, 467 U.S. 914 (1984). 907 F.2d at 877. The Tower dictum, however, has no relevance to the issue of exhaustion.[12]

In all, then, there is a pervasive confusion and uncertainty among the courts of appeals on the propriety of requiring exhaustion. Further review by this Court -- no matter what the ultimate outcome on the merits -- accordingly is necessary to bring clarification and uniformity to an important area of the law.

in fact sought not only damages but also injunctive relief. See No. 90-5854 Br. in Opp. at 9-10.

[12] In Tower, this Court held that "public defenders are not immune from liability in actions brought by a criminal defendant against state public defenders who are alleged to have conspired with state officials to deprive the § 1983 plaintiff of federal constitutional rights." 467 U.S. at 916. At the end of the opinion, the Court added this observation: "We * * * have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." Id. at 923 (emphasis added). This comment, which simply reserves judgment on a different issue (the court's duty to abstain rather than the litigant's obligation to exhaust) hardly can be said to impliedly overrule Wolff.

C. The Decision Below Is Erroneous

Finally, it of course also bears emphasis that the decision to recharacterize petitioner's Section 1983 action and to require exhaustion on that basis is, in several respects, incorrect. To begin with, it cannot be reconciled with the available evidence of Congress's intent on the issue of exhaustion.[13] Section 2254(b) expressly excludes from the exhaustion mandate claims for which "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective," thus suggesting that Congress intended to excuse state prisoners from making futile efforts to obtain damages in state post-conviction proceedings. 28 U.S.C. § 2254(b).[14] What is more, Section 1997e of the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. § 1997e, permits states to require exhaustion of state remedies prior to initiation of a Section 1983 action by a state prisoner -- but only in specified

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[13] As this Court has repeatedly recognized, "legislative purpose * * * is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts." Patsy v. Florida Bd. of Regents, 457 U.S. 496, 501 (1982); see also McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992).

[14] Relying on this exception, federal courts have declined to order exhaustion of state remedies where the only remedy sought in the federal petition is unavailable under state law. See, e.g., Brown v. Estelle, 530 F.2d 1280, 1284 (5th Cir. 1976) (prisoner under indictments on other charges need not exhaust state remedies where Texas courts could provide only release, but not a speedy trial on pending charges); Mott v. Dail, 337 F. Supp. 731, 731-32 (E.D.N.C. 1972) (prisoner seeking credit on sentence for time served need not exhaust state remedies where North Carolina courts could not provide this form of relief), appeal dismissed, 473 F.2d 1973 (4th Cir. 1973).

circumstances that are not present here. See Pet. App. 26a. As this Court has repeatedly recognized, CRIPA is strong evidence that Congress intended exhaustion to be required in Section 1983 actions brought by state prisoners only in circumstances covered by the statute -- and not otherwise.[15] See also Bressman v. Farrier, 900 F.2d 1305, 1311-14 (8th Cir. 1990) (Heaney, J., concurring and dissenting), cert. denied, 498 U.S. 1126 (1991).

Nor can the rule of recharacterization and exhaustion be justified of the ground advanced by the court below. The Seventh Circuit's view that exhaustion is necessary because, if petitioner "won his [Section 1983] case[,] the state would be obliged to release him" (Pet. App. 3a), rests on a misunderstanding of the applicable rules of issue preclusion. Even if petitioner were to prevail on his Section 1983 damages claims against the three governmental officials sued in their individual capacities in his complaint, petitioner could not invoke the issue-preclusive effect of that ruling against the State of Indiana in later Indiana

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[15] See McCarthy v. Madigan, 112 S. Ct. at 1089 (in declining to require federal prisoners to exhaust administrative remedies prior to bringing Bivens actions, indicating that "[w]e find it significant that Congress, in enacting Section 1997e, stopped short of imposing a parallel requirement in the federal prison context"); Patsy v. Board of Regents, 457 U.S. at 509 (stating that "[i]mplicit" in Congress's decision "to adopt the limited exhaustion requirement of § 1997e" is "Congress' conclusion that the no-exhaustion rule should be left standing with respect to other § 1983 suits."). In Patsy, moreover, this Court went further and explained that Section 1997e's "detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases." 457 U.S. at 511; id. at 508 ("A judicially imposed exhaustion requirement would be inconsistent with Congress's decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.").

proceedings for post-conviction relief. See Young v. Kenny, 907 F.2d at 876; Rule 1, §§ 2, 4(a), 9(d), 12(c), 12(f), Indiana Rules of Post-Conviction Remedies (Burns 1993). It is elementary that collateral estoppel, or issue preclusion, may only be asserted only against a party that "litigated and lost in an earlier action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979).[16] Accordingly, there is no risk here that the habeas exhaustion rule of Section 2254(b) will be circumvented through the operation of res judicata.[17]

In sum, the reasoning employed by the Seventh Circuit in ordering recharacterization and exhaustion of petitioner's damages claims is fundamentally flawed. There is no good reason to force petitioner to initiate against a different defendant a time-consuming state procedure that is incapable of providing the only relief he is seeking -- damages. Review of the judgment below accordingly is in order.

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[16] See Restatement (Second) of Judgments § 36 (1982) (party to be precluded in the second action must have appeared in the same capacity in the first action); Kentucky v. Graham, 473 U.S. 159, 167-68 (1985) ("A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him.").

[17] Nor is the exhaustion requirement justifiable on the ground that the prisoner suing for damages under Section 1983 "in fact" desires his release. See McCarthy v. Madigan, 112 S. Ct. 1081, 1091 (1992) (courts "cannot presume, as a general matter, that when a litigant has deliberately forgone any claim for injunctive relief and has singled out discrete past wrongs, specifically requesting monetary compensation only, that he is likely interested in 'other things'"); Hamlin v. Warren, 664 F.2d 29, 33 (4th Cir. 1982) (Winter, C.J., dissenting) (pointing out that plaintiff "was never interrogated on his motives").

II. If A Section 1983 Plaintiff Must Exhaust State Remedies, The Section 1983 Action Should Be Stayed, Rather Than Dismissed, In The Interim

Wholly apart from the propriety of the court of appeals' decision to require exhaustion of state remedies, its decision to dismiss rather than stay petitioner's Section 1983 action pending exhaustion "creates an intercircuit conflict," as the court below itself expressly acknowledged. Pet. App. 5a. But the holding below does more than "disagree" with the published decisions of seven other courts of appeals (id. at 3a) on the "difficult question" presented here (ibid.): the Seventh Circuit's holding that a Section 1983 action should be dismissed pending exhaustion will preclude the assertion of meritorious constitutional claims and create an additional layer of litigation in an already over-litigated area. Because that holding also is inconsistent both with decisions of this Court and with the manifest congressional intent, further review is warranted. Indeed, this issue is of enormous practical importance and warrants the Court's consideration even if it believes that review of the precedent question -- whether exhaustion is required -- is unnecessary.

A. The Decision Below Conflicts With The Holdings Of Other Courts Of Appeals

1. At the outset, the existence of a conflict in the circuits on this issue is undeniable, as the court below frankly acknowledged. The court of appeals itself recognized that the Second, Fifth, Eighth, and Ninth Circuits have held that dismissal of a Section 1983 claim is inappropriate in the circumstances of this case because it exposes the claimant to the risk that his

damages action, when later refiled, will be deemed barred by the statute of limitations. Pet. App. 3a (citing Jewell v. County of Nassau, 917 F.2d 738 (2d Cir. 1990) (per curiam); Young v. Kenny, 907 F.2d 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987); and Richardson v. Fleming, 651 F.2d 366 (5th Cir. 1981)). In addition, the Third, Fourth, Sixth, Tenth, and Eleventh Circuits have reached the same result. Prather v. Norman, 901 F.2d 915, 919 (11th Cir. 1990); Feaster v. Miksch, 846 F.2d 21, 24 (6th Cir.), cert. denied, 488 U.S. 857 (1988); Harper v. Jeffries, 808 F.2d 281, 285 (3d Cir. 1986); Hamlin v. Warren, 664 F.2d 29, 32 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); Smith v. Macy, 1992 U.S. App. LEXIS 1930 (10th Cir. Feb. 5, 1992) (unpublished disposition).

The analysis used by the Ninth Circuit in Young is typical. There, the court of appeals vacated the district court's order dismissing a prisoner's Section 1983 action and remanded for entry of a stay. Writing for the court, Judge Kozinski explained that dismissal "could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement" because exhaustion "may take years to complete" and "it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim." 907 F.2d at 878. "[I]t would hardly promote the goals of the Civil Rights Act of 1871," the Ninth Circuit added, "to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late."

Ibid. Accord, e.g., Jewell, 917 F.2d at 740-41 (vacating order of dismissal and remanding for entry of stay, since dismissal "would work a time-bar to reassertion of the § 1983 claim"); Offet, 823 F.2d at 1261 (reversing dismissal and directing district court to enter stay).[18]

As the court below recognized, that is precisely the danger here. See Pet. App. 3a-5a. The misconduct alleged in petitioner's lawsuit occurred in 1987; this action was timely filed on December 27, 1988. Under Owens v. Okure, 488 U.S. 235 (1989), the statute of limitations applicable to petitioner's Section 1983 action must be borrowed from Ind. Code § 34-1-2-2, which provides a two-year limitations period for personal injury actions. As the court of appeals further noted, the Indiana statute of limitations "is not tolled by a plaintiff's imprisonment" and, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." Pet. App. 3a. In these circumstances, other circuits plainly would have stayed, rather than dismissed, petitioner's Section 1983 action.

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[18] More recently, the Fifth Circuit has held that dismissal, rather than a stay, may be ordered in cases in which the plaintiff would be required to exhaust his remedies under Texas law. Jackson v. Johnson, 950 F.2d 263 (1992) (per curiam). As the court in Jackson explained, Texas adheres to a rule of "habeas abstention" under which state courts will not adjudicate state habeas claims while related federal claims are pending. Id. at 266. Thus, unless a federal court dismisses outright a Texas prisoner's § 1983 claim, the prisoner would never be able to satisfy the exhaustion requirement.

2. Recognizing this problem, the court below concluded that the prospect of a time-bar might be dealt with by invocation of the doctrine of equitable tolling -- in particular, by creation of a federal rule of equitable tolling.[19] For several reasons, however, the court of appeals' suggestion that an equitable tolling doctrine

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[19] The court recognized that, under Hardin v. Straub, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits." Pet. App. 4a. The court also observed that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." Pet. App. 3a. The State of Indiana agreed, in its supplemental brief filed below, that equitable tolling is unavailable under Indiana law in a case such as this one.

While the court of appeals identified Torres v. Parkview Foods, 468 N.E.2d 580 (Ind. App. 1984), as a case in which an Indiana court applied what the panel described as "a form of" equitable tolling (Pet. App. 4a), that decision almost certainly would not apply here. In Torres, the plaintiff mistakenly filed a lawsuit in federal court that was dismissed for lack of diversity. The court held that the statute of limitations was suspended at the time of the federal filing and that a subsequent state action could be initiated outside of the original limitations period. Id. at 583. Torres was based on the Indiana Journey's Account Statute, Ind. Code § 34-1-2-8, which provides that if a plaintiff's lawsuit "fails," a new action may be brought within five years. That statute, however, provides an extension only if the decision in the first action was not on the merits. Vesolowski v. Repay, 520 N.E.2d 433, 435 (Ind. 1988). In Torres, of course, the dismissal for lack of diversity jurisdiction was not on the merits, so the second suit could proceed. But neither Torres nor the Journey's Account Statute speaks to the situation here, where a plaintiff whose case is dismissed must then engage in a full round of collateral litigation in another forum before he can again present his claim. There is no provision in Indiana law for extending the statute of limitations if petitioner seeks post-conviction relief in the state courts and receives a determination on the merits. The court below, however, was not troubled by this point, explaining that "should it turn out that Indiana would not apply equitable tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal [tolling doctrine] would be applicable, and we think it would be." Pet. App. 4a.

might be applied here detracts neither from the importance of this case nor from the necessity for review by this Court.

First, application of an equitable tolling rule by the Seventh Circuit means that identically situated litigants in different circuits will be treated dissimilarly. If petitioner's suit had been brought in the Second, Third, Fourth, Fifth, Eighth, Ninth, or Tenth Circuits, he would, upon exhaustion of his state remedies, proceed immediately to the litigation of the merits of his Section 1983 action. In the Seventh Circuit, in contrast, he will have to litigate questions related to the statute of limitations. At best, this means that he will be subjected to a uniquely time-consuming and burdensome round of procedural litigation that is not required by other circuits; at worst, the Seventh Circuit's approach means that petitioner's claim will be time-barred.

Second, the Seventh Circuit's invocation of a federal rule of equitable tolling is itself inconsistent with the Second Circuit's decision in Jewell v. County of Nassau, supra. In Jewell, a prisoner filed a Section 1983 suit one day before expiration of the applicable New York statute of limitations, seeking damages and contending that "he was unlawfully arrested and questioned, his home was illegally searched, and as a result of these actions, he was improperly convicted of manslaughter." 917 F.2d at 739. The district court dismissed the suit pending exhaustion of state remedies because motions collaterally attacking the prisoner's conviction were pending in state court. The Second Circuit reversed. Explaining that New York law did not permit tolling

under the circumstances presented in the case, the court of appeals, relying on this Court's decisions in Board of Regents v. Tomanio, 446 U.S. 478 (1980), and Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), held that it was bound to follow state-law tolling rules because their application "does not violate" the "policy underlying the federal cause of action." 917 F.2d at 740. On the basis of this analysis, the Second Circuit concluded that dismissal would lead to the prisoner's Section 1983 suit being time barred and, accordingly, that the dismissal was erroneous. The Seventh Circuit itself acknowledged that its holding cannot be reconciled with Jewell, which "reached a different conclusion in a similar case." Pet. App. 4a.

Indeed, as the Second Circuit explained, the creation of a federal equitable tolling rule for use in Section 1983 litigation is in significant tension with this Court's decisions. On at least three occasions the Court has specifically declined to substitute a federal for a state tolling rule in a Section 1983 action, cautioning against "unravel[ing] state limitations rules" that apply to federal causes of action. Hardin v. Straub, 490 U.S. 536, 539 (1989). See id. at 543-44; Chardon v. Fumero Soto, 462 U.S. 650, 655-62 (1983); Tomanio, 446 U.S. at 492.[20] See also Wilson v. Garcia, 471 U.S. 261, 269 (1985); Johnson, 421 U.S. at 463-64.

The court below nevertheless concluded that if Indiana law would not excuse petitioner from compliance with the statute of

[20] The Court also has declined to adopt a federal tolling rule in cases arising under 42 U.S.C. § 1981. See Johnson, 421 U.S. at 466.

limitations, a federal tolling doctrine would have to apply because it would be "essential to the vindication of federal rights." Pet. App. 4a. But while this Court has recognized the possibility that state statutes of limitations and related tolling doctrines might not be used in Section 1983 litigation when their use "would defeat the goals of the federal statute" (Hardin, 490 U.S. at 539), the Court declined to apply that exception in Hardin, Chardon, and Tomanio. The Seventh Circuit offered no persuasive reason why the outcome would be any different in this case. See also Tomanio, 446 U.S. at 488 (explaining that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation") (internal quotations omitted); Robertson v. Wegmann, 436 U.S. 584 (1978) (applying state survivorship statute even though it precluded continuation of Section 1983 action).

Third, the Seventh Circuit's invocation of equitable tolling cannot be dismissed as a harmless frolic and detour that simply takes an alternative route to the same result (preservation of otherwise time-barred Section 1983 claims) as that reached by the circuits that stay Section 1983 actions pending exhaustion. For one thing, the Seventh Circuit's approach creates an additional layer of wasteful and time-consuming litigation. Resolution of disputes about whether the statute of limitations should be tolled will require the expenditure of very substantial judicial resources: federal courts will first have to examine state tolling rules, which is far from a simple matter (see Chardon, 462 U.S. at

667 (Rehnquist, J., dissenting)), and then (if state law does not recognize tolling) will have to proceed to a fact-specific inquiry into the plaintiff's good faith, the diligence with which the suit was pursued, and the possibility of prejudice to the defendant. See Pet. App. 4a.[21] This inquiry often will be more complex than an examination of the merits.[22]

By the same token, the course taken by the Seventh Circuit, in addition to being longer and rockier than the one charted by other courts of appeals, does not necessarily lead to the same destination. Under the equitable tolling doctrine recognized by the court below, a plaintiff may be time-barred through no fault of his own because delay has prejudiced the defense -- even though the plaintiff acted with due diligence and his failure to exhaust was "excusable." See Pet. App. 4a. If this rule is applied strictly, the Seventh Circuit will bar claims that other courts will permit; if it is applied loosely, the Seventh Circuit will have required a large volume of additional litigation that is to no one's

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[21] Insofar as the court of appeals was concerned that a plaintiff may be inexcusably dilatory in pursuing his claim (see Pet. App. 3a-4a), it failed to recognize that it is within a district court's inherent power, following the issuance of a stay, to take such actions as may become necessary to respond to occurrences in the state court proceedings. Harrison v. NAACP, 360 U.S. 167, 178 (1959); Romany v. Colegio de Abogados de Puerto Rico, 742 F.2d 32, 44 (1st Cir. 1984); New Jersey-Philadelphia Presbytery v. New Jersey State Bd. of Higher Educ., 654 F.2d 868, 887-88 (3d Cir. 1981).

[22] See Cleavinger v. Saxner, 474 U.S. 193, 207-08 (1985) ("the vast majority of prisoner cases are resolved on the complaint alone.")

advantage. In either case, the conflict in the circuits on this point warrants this Court's attention.

B. Section 1983 Suits Should Be Stayed Pending Exhaustion

It should be added that the decision below merits review not only because the circuits are in conflict on the stay versus dismissal issue, but also because the Seventh Circuit's conclusion plainly is incorrect. In circumstances substantially identical to those here, this Court held in Deakins v. Monaghan, 484 U.S. 193 (1988), that staying the Section 1983 action is the proper course. In Deakins, the targets of a criminal investigation by state officials brought suit under Section 1983 seeking the return of records and documents seized during the investigation, compensatory and punitive damages for asserted violations of their constitutional rights, and attorneys' fees. In light of the pendency of a grand jury investigation, the district court abstained under Younger v. Harris, 401 U.S. 37 (1971), and ordered the complaint dismissed.

This Court assumed without deciding that Younger abstention applies to Section 1983 claims for monetary relief and then instructed, in language equally applicable here, that a "District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding." Deakins, 484 U.S. at 202 (emphasis added). Endorsing as "sound" the Third Circuit's rule "requir[ing] a District Court to stay rather than dismiss" such claims, this Court explained that the requirement to stay "allows a parallel state proceeding to go

forward without interference from its federal sibling, while enforcing the duty of federal courts to assume jurisdiction where jurisdiction properly exists." Id. at 202-03 (internal quotations omitted). The Court specifically took note of the risk that, "unless [a district court] retain[s] jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations." Id. at 203 n.7.[23]

As several courts of appeal have recognized, the rationale of Deakins applies with equal force where a prisoner's Section 1983 claim for money damages must be exhausted in the state courts. Prather, 901 F.2d at 919; Feaster, 846 F.2d at 24; Williams v. Hepting, 844 F.2d 138, 144-45 (3d Cir.), cert. denied, 488 U.S. 851 (1988). The risk of forfeiture of legal rights posed by the statute of limitations is the same in both contexts. Petitioner's claim for damages cannot be redressed in Indiana post-conviction proceedings. See Rule 1, § 6, Indiana Rules of Procedure for Post-Conviction Remedies (Burns 1993) (if petitioner is entitled to relief, court "shall enter an appropriate order with respect to the conviction or sentence"). The district court accordingly has the same "unflagging obligation" (Deakins, 484 U.S. at 203, quoting

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[23] A stay under the circumstances presented in Deakins is consistent with the settled rule that courts should stay the action and retain jurisdiction when Pullman-type abstention is appropriate. See American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973) (per curiam); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 512-13 (1972); Zwickler v. Koota, 389 U.S. 241, 244-45 (1967).

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)) to exercise jurisdiction over petitioner's claims as did the court in Deakins. The panel's decision cannot be squared with the logic of Deakins.

In addition to disregarding the clear import of Deakins, the court below gave no weight to compelling evidence that a stay, rather than dismissal, is consistent with congressional intent. As explained above (see page 23, supra), in enacting CRIPA in 1980 Congress included a limited exhaustion provision that permits a federal court, under certain circumstances, to require a prisoner to exhaust state remedies. 42 U.S.C. § 1997e. Even if a court determines that exhaustion "would be appropriate and in the interests of justice," however, it is authorized by the statute only to "continue such case for a period of not to exceed ninety days in order to require exhaustion." Ibid. (emphasis added). Notably, Congress did not authorize dismissal of prisoner Section 1983 actions subject to CRIPA's limited exhaustion requirement, and indeed it limited the duration of any stay to a period of ninety days. McCarthy v. Madigan, 112 S. Ct. 1081, 1089 (1992). The panel's decision in this case cannot be reconciled with Congress's

intent as reflected in Section 1997e. Cf. id. at 1086 (1992).[24]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 1993

[24] In McCarthy, this Court held that a federal prisoner seeking only money damages in a Bivens action need not first exhaust administrative remedies in the federal Bureau of Prisons (BOP), because BOP remedies could not provide the only relief sought by the prisoner -- damages. In rejecting the exhaustion rule urged by the United States, this Court relied in part on the fact that the government's rule authorized dismissal for failure to exhaust, whereas Section 1997e of CRIPA -- the best evidence of Congress's intent -- permitted only a stay. 112 S. Ct. at 1089. Like the government's rule of exhaustion in McCarthy, the Seventh Circuit's rule of automatic dismissal is contrary to Congress's intent as expressed in CRIPA.

APPENDIX

single component"), *vacated on other grounds*, 153 Ill.2d 1, 178 Ill.Dec. 761, 605 N.E.2d 555 (1992); *see also Hilliard*, 834 F.2d at 1356. Accordingly, a component or part of a system can be an improvement to real property if it is an essential or integral part of the improvement to which it belongs. *Kleist*, 212 Ill.App.3d at 743, 156 Ill.Dec. at 841–42, 571 N.E.2d at 821–22 (citing *Mullis v. Southern Co. Servs., Inc.*, 250 Ga. 90, 94, 296 S.E.2d 579, 584 (1982)). In spite of this line of cases, Hausman's argument focuses upon the shear table alone without asserting facts contrary to Monarch's position that the shear table is an essential component of the entire anneal line. In the absence of facts materially inconsistent with this assessment, then, we find that Monarch's detailed description of the system supports its contention that the shear table was in fact integral to the system as a whole.

Thus our inquiry turns on whether the continuous anneal line was itself an improvement to real property. The *St. Louis* court found its ability to decide the case impaired by the lack of evidence regarding the scope of the project; its cost, size or weight; its method of installation; and the building modifications necessary to accommodate it. However, the record in the case before us is sufficiently detailed to allow us to evaluate the nature of the equipment and the construction process. The anneal line, which was 80 feet tall and more than 150 feet long, was part of a multimillion dollar construction project at Olin. To accommodate the equipment, Olin had to raise the roof of its building 50 feet, remove the floor to allow for new footings and foundations and install water drain and supply lines. The anneal line at issue here was the first strip anneal line to be placed in this particular part of the plant, and it was capable of handling heavier gauge coils than the other lines. Appellee's Supp. App. at 55.

Guided by the language in *St. Louis*, we conclude that the anneal line constitutes more than mere repairs or replacement, and also is a permanent installation that substantially enhances the value of the property by, *inter alia*, allowing Olin to anneal heavier gauge steel. *See St. Louis*, 153 Ill.2d at 4–5, 178 Ill.Dec. at 762, 605 N.E.2d at 556; *Calumet Country Club v. Roberts Envtl. Control Corp.*, 136 Ill.App.3d 610, 91 Ill.Dec. 267, 483 N.E.2d 613 (1985) (stating that an improvement "substantially enhances the value of the property"); *Hilliard*, 834 F.2d at 1354–55 (citing *Calumet Country Club*). The project therefore constitutes an improvement to real property within the meaning of paragraph 13–214 and the terms of that provision prohibit Hausman's suit.

III.

The language of section 13–214 comprehends Monarch's involvement in the construction of the anneal line, and the project itself constitutes an improvement to real property within that statute of repose. As a result, Hausman's cause of action is barred and summary judgment for the defendant was proper. For the foregoing reasons, we AFFIRM the decision of district court.

Roy HECK, Plaintiff-Appellant,

v.

James HUMPHREY, Dearborn County Prosecutor, Robert Ewbank, Attorney, and Michael Krinoph, Indiana State Police Investigator, Defendants-Appellees.

No. 89-1323.

United States Court of Appeals, Seventh Circuit.

Submitted July 24, 1992.

Resubmitted March 1, 1993 *.

Decided July 1, 1993.

Inmate brought § 1983 action against county prosecutor, attorney, and state police investigator, alleging that his state murder conviction was "engineered" in violation of his constitutional rights. The United States District Court for the Southern District of Indiana, James E. Noland, J., dismissed action. Inmate appealed. The Court of Appeals, Posner, Circuit Judge, held that district court properly dismissed, rather than stayed, action for inmate's failure to exhaust state remedies.

Affirmed.

1. Action ⇐68

Federal Civil Procedure ⇐1788.10

District court properly dismissed, rather than stayed, inmate's § 1983 action, alleging that his state murder conviction was "engineered" in violation of his constitutional rights, for his failure to exhaust state remedies; if, after exhaustion, inmate refiled his § 1983 action and was met by statute of limitations defense, he could raise doctrine of equitable tolling. 42 U.S.C.A. § 1983.

2. Habeas Corpus ⇐319.1, 431

If, regardless of relief sought, inmate is challenging legality of state conviction, so that if he won his case the state would be obliged to release him even if he had not sought that relief, suit is classified as "application for habeas corpus" and plaintiff must exhaust his state remedies, on pain of dismissal.

See publication Words and Phrases for other judicial constructions and definitions.

3. Limitation of Actions ⇐1

Policy of statute of limitations is to bar stale suits.

4. Limitation of Actions ⇐104½

Under "doctrine of equitable tolling," person is not required to sue within statutory period if he cannot in the circumstances reasonably be expected to do so.

See publication Words and Phrases for other judicial constructions and definitions.

5. Limitation of Actions ⇐104½

There must be diligence on part of party seeking to invoke doctrine of equitable tolling, and diligence must continue up to time of suit.

6. Federal Courts ⇐425

Statute of limitations applicable to § 1983 claim is borrowed state statute, and state, not federal, tolling provisions apply to state statutes of limitations borrowed for § 1983 suits. 42 U.S.C.A. § 1983.

7. Federal Courts ⇐411

In enacting statute extending state law to govern federal trial under federal civil rights statute when federal civil rights statute is deficient in provisions necessary to furnish suitable remedies, Congress intended that gaps in federal civil rights acts should be filled by state law, but only as long as that law is not inconsistent with federal law and does not defeat chief § 1983 goals of compensation and deterrence. 42 U.S.C.A. §§ 1983, 1988.

8. Federal Courts ⇐427

Body of state statute of limitations tolling law that lacks provision for equitable tolling is inconsistent with provision of complete federal remedy under § 1983 and, thus, is overridden by federal doctrine of equitable tolling when § 1983 plaintiff is required to exhaust state remedies because his claim is in part claim for habeas corpus. 42 U.S.C.A. §§ 1983, 1988.

Kathleen M. O'Laughlin, Keck, Mahin & Cate, Chicago, IL, for plaintiff-appellant.

David M. Wallman, Deputy Atty. Gen., Office of the Atty. Gen., Federal Litigation, Indianapolis, IN, for defendants-appellees.

Before CUMMINGS, POSNER, and MANION, Circuit Judges.

POSNER, Circuit Judge.

[1, 2] This pro se prisoner civil rights suit charges that the defendants engineered the

* After appointment of counsel for the appellant, and receipt of supplemental briefs dealing with the issue of equitable tolling.

plaintiff's conviction for murder by, among other wrongful conduct, the destruction of exculpatory evidence. Compensatory and punitive damages were sought. The plaintiff made no effort to exhaust his state remedies against wrongful conviction, however, and this was, as the district court ruled in dismissing the suit, a fatal omission. If, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so. *Viens v. Daniels*, 871 F.2d 1328, 1332 (7th Cir.1989); *Scruggs v. Moellering*, 870 F.2d 376, 379 (7th Cir.1989); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir.1986) (per curiam). This is such a case, as the plaintiff, while not explicitly requesting that his conviction be vacated, claims that he would not have been convicted had the defendants not violated his constitutional rights. Indeed, if his conviction were proper, this suit would in all likelihood be barred by res judicata.

[3] The difficult question is whether the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refiling it after he exhausts his state remedies. The defendants' alleged misconduct took place in 1987 and the applicable statute of limitations is only two years and is not tolled by a plaintiff's imprisonment. Ind.Code §§ 34–1–2–2, 34–1–67–1(6); *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Bailey v. Faulkner*, 765 F.2d 102 (7th Cir.1985). So if we affirm the dismissal of his suit, and Heck should later refile after exhausting his state remedies, he will be met by a defense of statute of limitations (though, as we shall see, other state tolling doctrines may be available to him). In these circumstances several decisions of other circuits hold that the district court should stay rather than dismiss the suit. *Jewell v. County of Nassau*, 917 F.2d 738 (2d Cir.1990) (per curiam); *Young v. Kenny*, 907 F.2d 874, 878 (9th Cir.1990); *Offet v. Solem*, 823 F.2d 1256, 1258 n. 2 (8th Cir.1987); *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir.1981). We respectfully disagree. Such an approach gives inadequate weight to the policy of the statute of limitations, which is to bar stale suits. Should Heck dawdle in exhausting his state remedies, this suit might resume almost a decade after the statute of limitations had expired.

[4, 5] If instead of being stayed, the civil rights suit is dismissed, this sets the stage for confronting the issue of staleness head-on at a time when all the facts bearing on the issue will be known—when the plaintiff, having finally exhausted his state remedies, wishes to resume the civil rights case. When the defendants plead the statute of limitations to a refiled suit, the plaintiff can riposte with the doctrine of equitable tolling—a defense to the defense of statute of limitations. The doctrine is straightforward: "a person is not required to sue within the statutory period if he cannot in the circumstances reasonably be expected to do so." *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1376 (7th Cir.1992). It has been applied to a prisoner's civil rights case in which the statute of limitations ran while the prisoner was exhausting his state remedies. *Rodriguez v. Holmes*, 963 F.2d 799, 805 (5th Cir.1992). Rather than giving the plaintiff an automatic extension of indefinite duration, no matter how much his carelessness or sloth may have contributed to the delay in the prosecution of his claim, the doctrine of equitable tolling gives the plaintiff just so much extra time as he needs, *despite all due diligence on his part*, to file his claim. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451–53 (7th Cir.1990). There must be diligence, and the diligence must continue up to the time of suit—you cannot be diligent for a year, and then wait another year to sue.

The cases that we have cited involve, it is true, the *federal* doctrine of equitable tolling. We have not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations. However, *Torres v. Parkview Foods*, 468 N.E.2d 580 (Ind.App.1984), holds that if a plaintiff in good faith files a diversity suit in

federal district court but the suit is later held to be outside the diversity jurisdiction and is therefore dismissed without an adjudication of the merits, the statute of limitations for refiling the suit in state court is tolled. This is a form of equitable tolling, and the point emphasized by the court—that the filing of the suit, albeit in the wrong court, gave the defendant all the notice it needed—is equally applicable here. But should it turn out that Indiana would not apply equitable-tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal doctrine would be applicable, and we think it would be.

[6–8] It is true that, although a claim under 42 U.S.C. § 1983 is a federal claim, the statute of limitations applicable to it is a state statute borrowed for the occasion; and the Supreme Court has held that state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits. *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). We held the contrary in *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir.1984), but failed even to cite *Tomanio* (*Hardin* hadn't been decided yet). See *Smith v. City of Chicago Heights*, 951 F.2d 834, 840 (7th Cir.1992). Neither *Tomanio* nor *Hardin*, however, dealt with a situation in which a federal tolling doctrine was essential to the vindication of federal rights. Congress, in enacting 42 U.S.C. § 1988 (which provides that in the event that a federal civil rights statute is "deficient in the provisions necessary to furnish suitable remedies ... [state law], so far as the same is not inconsistent with [federal law], shall be extended to and govern" the federal trial), intended that "gaps in federal civil rights acts should be filled by state law," *Hardin v. Straub*, *supra*, 490 U.S. at 538, 109 S.Ct. at 2000, but only "as long as that law is not inconsistent with federal law" and does not defeat section 1983's "chief goals of compensation and deterrence." *Id.* at 538–39, 109 S.Ct. at 2001. *Tomanio* distinguished the case where the federal right "is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had." 446 U.S. at 490, 100 S.Ct. at 1798. That is our case. If we are right that a 1983 plaintiff is not entitled to an indefinite stay while he exhausts whatever state remedies he is required to exhaust because his claim is in part one for habeas corpus, it follows that a body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete federal remedy under section 1983 and therefore is overridden by the federal doctrine. *Jewell v. County of Nassau*, *supra*, 917 F.2d at 740, reached a different conclusion in a similar case, but without giving reasons. Its conclusion became the basis for its ruling that the case should be stayed rather than dismissed; the court could see no other way to avoid the bar of the statute of limitations.

We think the dismissal of Heck's suit should therefore be affirmed. When and if he exhausts his state remedies and refiles this suit, and the defendants plead the statute of limitations, the district judge will have to decide whether the elements of equitable tolling have been met. The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably untrained in law. If both questions are answered in the affirmative, a third question becomes relevant—whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies. *Seattle Audubon Society v. Robertson*, 931

F.2d 590, 597 (9th Cir.1991). We express no view on the proper answers to these questions in this case; that would be premature. We hold merely that the suit was properly dismissed, rather than stayed. Because this decision creates an intercircuit conflict, we have circulated it to the entire court, pursuant to Circuit Rule 40(f). A majority of the judges voted not to hear the case en banc, Judges Cudahy, Ripple, and Rovner dissenting.

AFFIRMED.

KEY NUMBER SYSTEM

GREEN RIVER BOTTLING COMPANY,
Plaintiff-Counterdefendant-Appellee,

v.

GREEN RIVER CORPORATION and Daniel J. Meyers, Defendants-Counterplaintiffs/Third-Party Plaintiffs-Appellants,

v.

A-BARR SALES, INCORPORATED, Sethness-Greenleaf, Incorporated, Bernard Barc, et al., Third-Party Defendants-Appellees.

No. 92-3577.

United States Court of Appeals, Seventh Circuit.

Argued April 2, 1993.

Decided July 1, 1993.

Soft drink manufacturer brought action against corporation for breach of contract for corporation's purchase of manufacturer's trademark and secret formula. Corporation counterclaimed for trademark infringement. Soft drink distributor brought action against corporation arising from corporation's use of different formula in soft drink. Actions were joined. Parties moved for preliminary injunctions. The United States District Court for the Northern District of Illinois, John A. Nordberg, J., denied corporation's motion. Corporation appealed. The Court of Appeals, Posner, Circuit Judge, held that corporation was not entitled to preliminary injunction barring manufacturer from using trademark and secret formula.

Affirmed.

1. Trade Regulation ⇐620, 621.1

As long as district judge in trademark infringement action was satisfied that corporation seeking preliminary injunction against soft drink manufacturer's use of trademark and secret formula had more than trivial chance of succeeding on the merits, he should have considered irreparable harms to parties of granting and of denying request for preliminary injunction.

2. Trade Regulation ⇐620

Even if corporation had only modest chance of prevailing on merits on its trademark infringement counterclaim against soft drink manufacturer, corporation would have been entitled to preliminary injunction against manufacturer's use of trademark and secret formula if corporation could show that denial of injunction would inflict severe irreparable harm on it while grant of injunction would inflict little or no irreparable harm on manufacturer and soft drink distributor.

3. Trade Regulation ⇐620

Fact that district judge had not determined merits of parties' substantive claims on summary judgment in breach of contract and trademark infringement action did not disentitle any of parties to preliminary injunction.

4. Trade Regulation ⇐621.1

Corporation was not entitled to preliminary injunction with respect to its trademark infringement counterclaim in soft drink manufacturer's action for breach of contract for corporation's purchase of manufacturer's "Green River" trademark and secret formula; corporation was not entitled to formula under contract until it paid full purchase price and, until then, trademark stayed with formula,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ROY HECK,

Plaintiff,

v.

JAMES HUMPHREY, Dearborn County Prosecutor,
ROBERT EWBANK, Attorney,
MICHAEL KRINOPH, Indiana State Police Investigator; All in their Official and Individual Capacities,

Defendants.

CAUSE NO. NA 88-209-C

JUDGMENT

This cause is before the Court on the complaint of Roy Heck and on his Application to Proceed in Forma Pauperis.

Whereupon the Court, having read and examined such Application and complaint, and having this day made its Entry,

IT IS NOW ORDERED, ADJUDGED AND DECREED that the plaintiff's Application to Proceed in Forma Pauperis is DENIED, that the plaintiff take nothing by his complaint and this cause of action is DISMISSED WITHOUT PREJUDICE.

James E. Noland
JAMES E. NOLAND, Judge
United States District Court

Date: FEB 1, 1989

OBV 36, P 99 4/4 from Judge.

Entered 2-1-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ROY HECK, Plaintiff, v. JAMES HUMPHREY, Dearborn County Prosecutor, ROBERT EWBANK, Attorney, MICHAEL KRINOPH, Indiana State Police Investigator; All in their Official and Individual Capacities, Defendants.	)	CAUSE NO. NA 88-209-C

ENTRY

This cause is before the Court on the complaint of Roy Heck and on his Application to Proceed in forma pauperis. The Court, having read and examined such Application and the complaint, and being duly advised, now makes its ruling.

Plaintiff Roy Heck is confined at the Westville Correctional Center. He brings this action against James Humphrey and Robert Ewbank, identified as Dearborn County prosecutors at the time relevant to the complaint, and against Michael Krinoph, an investigator with the Indiana State Police. He alleges that the defendants acted improperly in an investigation culminating in his being charged with killing his wife.

Although it is highly doubtful that the plaintiff's claim contains any merit whatsoever, it is plain that the issue he raises directly implicate the legality of his confinement. The exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may

be brought only after available state remedies have been exhausted. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973); Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986); Taylor v. Kavanagh, 640 F.2d 450, 451 (2nd Cir. 1981); Waste Management of Wisconsin, Inc. v. Fokakis, 614 F.2d 138, 142 (7th Cir. 1980); Hanson v. Circuit Court of the First Judicial Circuit of Illinois, 591 F.2d 404 (7th Cir.), cert. denied 444 U.S. 907 (1979).

The Supreme Court has criticized "the continued illogic of treating federal habeas and §1983 actions as fungible remedies for constitutional violations." Allen v. McCurry, 449 U.S. 90, 105n.24 (1980). Recent decisions from our Court of Appeals indicate that in some circumstances a court should refrain from entertaining a civil rights action where a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement until such plaintiff has fully exhausted his state remedies challenging such confinement. Crump v. Lane, 807 F.2d 1394 (7th Cir. 1986); Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986). That is the situation here, and for the present the broad, general terms of section 1983 must yield to the exclusiveness of the remedy of habeas corpus in federal court. Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986).[1] Accordingly, the plaintiff's request to proceed in forma pauperis must be denied and the action dismissed without prejudice.

IT IS SO ORDERED this 15 day of February 1989.

James E. Noland

JAMES E. NOLAND, Judge
United States District Court

[1]Because the plaintiff has not alleged and the Court could not establish that he has completed the appellate process in Indiana, construing the present complaint as a habeas corpus petition would also result in dismissal without prejudice for failure to satisfy the exhaustion requirement of the federal habeas statute.

issues of material fact and granting summary judgment to Mende. The trial court focused on whether Alu-span was defective, and Mende urges us that there is no evidence of defect.

[5] Before granting summary judgment, the trial court must find that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The court must liberally construe all evidence in favor of the non-moving party and resolve any doubt against the moving party. Even if the trial court believes the non-moving party will not succeed at trial, summary judgment is inappropriate where material facts conflict or undisputed facts lead to conflicting inferences. *Yang v. Stafford* (1987), Ind. App., 515 N.E.2d 1157. We review a trial court's grant of summary judgment on this same basis.

[6] The trial court's summary judgment order states:

> A substantial difference exists between a product that is not merchantable or fit for a particular purpose and one that is defective. If it is defective it is highly unlikely it could be merchantable or fit for the particular purpose. However, it could be unmerchantable or unfit for the particular purpose without being defective. With implied warranties it is only necessary that some malfunction exist[s] that makes it unmerchantable or unfit for the particular purpose rather than showing the existence of some specific dereliction by the manufacturer that constitutes a breach. Whereas the express warranty is that the product is free under normal use from substantial defects in material or workmanship, a specific defect must be shown to constitute a breach or warranty.

We disagree with the trial court's interpretation of the express warranty terms "normal use" and "defect."

The facts before the trial court on summary judgment are subject to conflicting inferences. Who would "normally use" this product and for what purpose would they use it? Was Alu-span "defective" within the meaning of the express warranty? The black-letter definition of "defective" suggests that a good may be defective as the result of some sort of imperfection or dereliction, and it may also be "defective" when the product is not fit for the ordinary purposes for which it was sold or used. Black's Law Dictionary 376 (5th ed. 1979).

When the facts are viewed most favorably for non-movant Travel Craft, the express warranty may be interpreted as tantamount to an express warranty of fitness for a particular purpose.

We affirm the trial court's decision on implied warranties. We reverse its grant of summary judgment on the express warranty and remand the case for further proceedings, to be conducted in accord with our holding on the admission of parol evidence.

DeBRULER, GIVAN and DICKSON, JJ., concur.

PIVARNIK, J., not participating.

Roy HECK, Sr., Appellant,

v.

STATE of Indiana, Appellee.

No. 15S00-8711-CR-1081.

Supreme Court of Indiana.

April 6, 1990.

Defendant was convicted in the Dearborn Circuit Court, Anthony C. Meyer, J., of voluntary manslaughter of his wife, and he appealed. The Supreme Court, Givan, J., held that: (1) circumstantial evidence supported conviction; (2) it was not impermissible for witness to ask police to hear tape recording of defendant's voice; (3) evidence concerning defendant's prior assaultive conduct toward wife was properly admitted; and (4) hearsay evidence was not improperly admitted.

Affirmed.

DeBruler, J., dissented with separate opinion.

Dickson, J., concurred in result without separate opinion.

1. Criminal Law ⇐552(1)

Jury's verdict may be based solely upon circumstantial evidence.

2. Homicide ⇐255(2)

Circumstantial evidence supported defendant's voluntary manslaughter conviction in connection with death of his wife; defendant had history of battering his wife, falsely indicated that wife had gone on trip when she disappeared, and left state when police obtained search warrant to search his farm, where wife's body was found, and pathologist, after first indicating that he could not state cause of wife's death due to advanced state of decomposition, later observed that presence of broken jaw could indicate blow to head which might have been severe enough to cause death.

3. Homicide ⇐236(1)

Cause of death may be established by circumstantial evidence.

4. Criminal Law ⇐339.6, 339.10(1)

Witness' request that police allow her to hear tape recording of murder defendant's voice did not constitute impermissibly suggestive identification or taint witness' in-court identification of defendant's voice as voice she heard on night of victim's disappearance.

5. Criminal Law ⇐742(1)

Witness' testimony concerning conversation she heard on night murder victim disappeared—witness identified defendant's voice as voice of person with whom victim had conversation—could be considered by jury despite inconsistencies as to what witness said she heard; inconsistencies were fully disclosed to jury, as was fact that witness had limited understanding and use of English language.

6. Criminal Law ⇐371(12), 419(2.20)

Where murder victim (defendant's wife) had, on several previous occasions, exhibited physical injuries and notified observers that injuries were inflicted by defendant, testimony concerning such notification was admissible despite hearsay nature to show defendant's state of mind at time of previous attacks and to demonstrate his motive and likelihood that he was perpetrator of fatal attack, notwithstanding defendant's contention that there was no evidence to show that victim died in manner similar to any of prior attacks.

7. Criminal Law ⇐419(4)

Under "*Patterson* exception" to hearsay rule, declarant's prior out-of-court statements may be put in evidence when declarant is in court and testifies.

See publication Words and Phrases for other judicial constructions and definitions.

8. Criminal Law ⇐419(3)

Police officer's testimony concerning telephone conversation he had with witness as to whether murder victim had made trip at time of her disappearance as defendant claimed did not amount to hearsay since it was placed in evidence for proper purpose of showing why officer's investigation took turn it did and not for purpose of establishing whether victim had made trip.

9. Criminal Law ⇐1186.1

Where admission of individual items of evidence does not constitute reversible error, reversal cannot be based upon cumulative effect of that evidence.

10. Criminal Law ⇐683(2)

Scope of rebuttal evidence is within trial court's discretion.

11. Criminal Law ⇐683(1)

Evidence which explains, contradicts, or disproves adversary's evidence may be competent rebuttal evidence.

12. Criminal Law ⇐683(1)

Defendant accused of murdering wife "opened the door" to daughter's rebuttal testimony concerning defendant's threats of violence when she reported that she was raped by presenting evidence attempting to

show that relationship between daughter and victim had been turbulent and that victim had told daughter that it was her own fault that she had been raped.

13. Criminal Law ⇐665(5)

Where there has been violation of witness separation order, trial court, in absence of connivance or collusion by party calling witness, may exercise its discretion to permit witness to testify.

14. Criminal Law ⇐665(5)

Trial court did not abuse its discretion in allowing witnesses to testify despite fact that they had violated witness separation order; there was no indication that prosecution connived to have witnesses violate order, and it was in fact not known after witnesses' initial testimony whether they would have to be recalled.

15. Criminal Law ⇐412(4)

There was no hearsay problem with taped police interviews of murder defendant since defendant testified at trial and was subject to examination concerning interviews.

16. Criminal Law ⇐412(5)

Since murder defendant filed alibi notice, his taped, nonconfessional interviews with police were admissible; interviews concerned defendant's whereabouts on the night of murder.

17. Criminal Law ⇐1169.2(7)

Any error in admitting certified copy of petition for dissolution of marriage, which included restraining order against defendant, was not reversible in defendant's prosecution for murdering wife since such evidence was merely cumulative of other evidence of prior abuse by defendant.

18. Criminal Law ⇐396(1)

Since defendant accused of murdering wife questioned police officer as to how many charges involving abuse of wife had been filed against him and questioned delay in filing, request for initial hearing which stated that defendant had been arrested on bench warrant on battery charge unrelated to murder charge was properly admitted to explain delay.

19. Criminal Law ⇐1169.1(8)

It was not reversible error to permit police officer to testify concerning direction his investigation took after he overheard telephone conversation between murder defendant and his girlfriend, notwithstanding defendant's claim for first time on appeal that eavesdropping violated his Fourth Amendment rights. U.S.C.A. Const. Amend. 4.

Kathleen A. Dayson, Indianapolis and Joseph W. Votaw, III, Lawrenceburg, for appellant.

Linley E. Pearson, Atty. Gen. and Michael Gene Worden, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Justice.

A jury trial resulted in the conviction of appellant of Voluntary Manslaughter, for which he received a sentence of fifteen (15) years.

The facts are: The appellant, Roy Heck, Sr., and the decedent, Rickie Heck, were husband and wife. In August of 1985, Rickie started dissolution proceedings against appellant. Sometime between January 5 and 6, 1986, while the dissolution proceedings were pending, the decedent disappeared.

In late October of 1986, her decomposed remains were found buried on appellant's farm. Dr. Lee Lehman, a pathologist, testified that he performed an autopsy on the remains of the decedent in October of 1986, but because of the advanced decomposition of the remains, he found no demonstrative cause of death. However, after further consideration, the pathologist's report was changed, and because of a broken jaw, which he believed had been inflicted near the time of death, he theorized the probability was that the decedent had died as a result of a severe blow to the head.

Near midnight on January 6, 1986, a number of witnesses in the vicinity of the trailer in which the decedent lived heard an argument between the decedent and another person. Some of these people did not

see the other person, while others stated that they saw the decedent arguing with a tall young man. One of these witnesses, Tessie Standriff, stated that her trailer was near the decedent's trailer and that she heard the argument and could identify appellant as the person arguing with the decedent. She stated that she could not identify him by his face but could identify him by his voice.

At trial, she testified that appellant told the victim she was coming home because she was his wife. However, during a pretrial deposition, she had indicated she had not heard such a statement. The evidence shows that Mrs. Standriff was Philippine and had a limited use and understanding of the English language.

Some of the witnesses testified they heard screaming and gunshots that night. Following the decedent's disappearance, appellant told various relatives that she had told him she was taking a trip to Florida. When Roy Heck, Jr. went with appellant to the decedent's trailer, he noticed food still on the stove. He also noticed the trailer was messed up, which was unusual for his mother. The following day, Junior observed one of his mother's suitcases in appellant's home.

A few weeks before the victim's disappearance, appellant had beaten her and was scheduled to go to trial on charges stemming from that incident the week the victim disappeared. When he failed to appear in court, he was arrested. While in jail, he was visited by his daughter, Roberta, and his girlfriend, Shirley Slaughter. He asked them to sprinkle pepper over the site of a sinkhole on his farm (this is the location where the body eventually was found). He also asked them to remove the victim's possessions from his home, including spare purses and a suitcase, before the police searched the house. The women complied with the request the next day. The suitcase contained items of female apparel. The purse contained the victim's drivers license, social security card, make-up, and other such items.

Appellant also requested that the two women telephone the police pretending to be the victim. Shirley attempted to comply with appellant's request. Appellant later told Roberta to keep quiet about her mother's purse and drivers license.

Robert Cuneo testified that he and his father were in the roof repair business and that in times past appellant had permitted them to dump old shingles on his farm. Shortly after the victim's disappearance, appellant contacted the elder Cuneo and asked him to dump some old shingles in the area where the victim's body later was found. He told Cuneo that he wanted the shingles dumped there to cover up the smell of some soured corn. Robert Cuneo testified that the area appeared to have been recently dug out and smoothed over.

In March of 1986, Roberta was in Florida with Eleanor Slaughter, Shirley's mother-in-law, and Shirley's daughter, Shawn Theis. She observed that Eleanor had the victim's ring in her possession with other jewelry to be sold. Eleanor told her that appellant had given her the ring to sell. Appellant later claimed that he had obtained the ring when the victim threw it at him during an argument.

In October of 1986, appellant was served with a warrant to search his farm and in particular the sinkhole site where the victim's remains later were found. Shortly after the warrant was served, appellant left and went to Tennessee. However, he returned shortly and turned himself in to the police.

[1, 2] Appellant claims the evidence is insufficient to support his conviction and couples this with his claim that much of the evidence submitted was inadmissible. Appellant contends the State's evidence fails to disclose the cause, means, manner, place, or time of the victim's death. It is true that none of these facts was established by direct evidence. However, a jury's verdict may be based solely upon circumstantial evidence. *Rowan v. State* (1982), Ind., 431 N.E.2d 805.

In the case at bar, there is ample evidence to support a finding that appellant had a history of battering his wife, including a criminal charge for which he was to

go on trial near the time of her disappearance. There also was evidence that at the time of the victim's disappearance, appellant had stated falsely to others that his wife had gone on a trip. He also removed luggage and personal items from her trailer to his home, then instructed his girlfriend and his daughter to remove those items before police came to the house.

Further, appellant's conviction is supported by the fact that the victim's remains were found buried on appellant's farm, that he caused others to dump old shingles on the site of her burial, and that when police obtained a search warrant to search his farm he left the state. His flight was relevant although appellant did return to Indiana of his own volition and turn himself in to the police. The jury also was entitled to believe that a man fitting appellant's general description was heard engaged in a heated argument with the decedent at her trailer on the evening she disappeared.

Appellant claims the State failed to prove by any credible evidence the cause of the decedent's death. It is true that when the remains were first examined by the pathologist, he stated that due to the state of decomposition he could not state a cause of death. However, upon further consideration, he observed that the presence of a broken jaw, which had occurred at approximately the time of death, could indicate a blow to the head which might have been severe enough to have caused death.

[3] This Court has held that the cause of death may be established by circumstantial evidence. *Patterson v. State* (1988), Ind., 532 N.E.2d 604. There is ample circumstantial evidence in this case to support the jury's determination that the victim had met a violent death at the hands of appellant.

Appellant attacks the testimony of State's witness Tessie Standriff, whose trailer was situated near the trailer of the victim. She testified that on the night of the victim's disappearance, she heard the victim having a heated argument with a tall man. She was unable to identify his face, but she said she recognized his voice as appellant's.

[4] Appellant points out that during the investigation Standriff came to the police department and asked to hear the voice of appellant on a tape recorder. The police complied with her wish. She verified that the voice was the same voice she had heard on the night of the victim's disappearance. Appellant contends that this constituted an impermissibly suggestive identification of appellant's voice in that Standriff knew she was listening to the voice of appellant at the time she made the identification.

It is true that this Court has held that it is improperly suggestive for police to inform a lineup observer that the suspect is in the lineup. *Chambers v. State* (1981), Ind., 422 N.E.2d 1198; *Young v. State* (1979), 272 Ind. 1, 395 N.E.2d 772. However, this was not a lineup or voice identification instituted by the police officers.

Standriff suspected that the person she had seen and heard was the husband of the victim, and she came to police headquarters knowing that they had tape recordings of appellant's voice and she wanted to assure herself that she was correct in believing the person she had heard was in fact appellant. This certainly does not fall within the framework of a police-engineered lineup or voice identification.

Rather than a thing to be condemned, Standriff's action was a proper and conscientious thing to be condoned. She merely was striving to make sure she had not made an error in the voice identification. We see nothing in this episode to taint her in-court identification of appellant's voice and her statement that the voice was the same voice she had heard on the night of the victim's disappearance.

[5] Appellant also contends that Mrs. Standriff's testimony should not be believed because during the early stages of the investigation she had stated that she had not heard the man state that the victim should come home with him because she was his wife. However, at trial she testified that such was the conversation she heard. This inconsistency was fully disclosed to the jury. It also was disclosed that Mrs. Standriff was from the Philippines and that she had a very limited understanding and use of the English language. The jury was entitled to determine whether this fact contributed to the apparent inconsistencies in Standriff's statements. *Bane v. State* (1981), Ind., 424 N.E.2d 1000.

[6] Appellant claims the judgment is contrary to law due to the highly prejudicial and irrelevant hearsay testimony of certain of the State's witnesses. Twelve different witnesses testified concerning various incidents in which the decedent had displayed bruises and informed other persons that she had been beaten by appellant. In situations such as the case at bar, where the victim on several previous occasions has exhibited physical injuries and has notified observers that the injuries were inflicted by the defendant, such testimony, although hearsay, is admissible to show the defendant's state of mind at the time of those attacks and to demonstrate his motive and the likelihood that he was the perpetrator of the fatal attack upon the decedent. *Drummond v. State* (1984), Ind., 467 N.E.2d 742, citing *Romine v. State* (1983), Ind., 455 N.E.2d 911 and *Moore v. State* (1981), 275 Ind. 39, 414 N.E.2d 558.

Appellant attempts to distinguish this line of cases, stating that although he and the decedent had an on-going relationship, there was no evidence that the deceased died in a manner similar to any of the prior assaults. Thus, he argues, the testimony in addition to being hearsay was irrelevant. We cannot agree with appellant in his evaluation of this evidence. The prior injuries to the victim were claimed by her to be the result of physical beatings from appellant. The evidence in this case, although wholly circumstantial, was that there was a high probability the victim died from a beating of such severe intensity that a broken jaw resulted. Rather than distinguishing the line of cases above cited, such evidence brings the case squarely within the rationale of those cases.

We see no error in the admission of the evidence of prior beatings suffered by the victim at the hands of the appellant.

[7] Appellant claims the trial court erred when it allowed Robert Cuneo to testify what his father, Harry Cuneo, had told him regarding appellant's request that they dump shingles at a designated place on his farm. However, this comes under the *Patterson* exception to the hearsay rule that when the declarant is in court and testifies, his prior out-of-court statements may be put in evidence. *Patterson v. State* (1975), 263 Ind. 55, 324 N.E.2d 482. Appellant makes the same complaint against the testimony of Mary Cuneo. Her testimony was admissible for the same reason. *Id.*

[8] Appellant also contends it was error to admit the testimony of Detective Michael Kreinhop concerning a telephone conversation he had with Donna Brady as to whether the victim had made a trip to Florida at the time of her disappearance. This testimony, however, was not placed in evidence for the purpose of the truth of whether the victim had gone to Florida but for the purpose of showing why the officer's investigation took the turn it did. The evidence was admissible to show the reason for the officer's subsequent action. *Altmeyer v. State* (1988), Ind., 519 N.E.2d 138; *Boyd v. State* (1986), Ind., 494 N.E.2d 284, *cert. denied.* 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860; *Stout v. State* (1985), Ind., 479 N.E.2d 563.

[9] Appellant claims even if this Court would hold that the testimony of the various individuals was admissible, the sheer number of witnesses who testified to extrajudicial statements rendered them so prejudicial as to require reversal. However, this Court has held that where individual items of evidence do not constitute reversible error, we will not reverse based upon the cumulative effect of that evidence. *See Stonebraker v. State* (1987), Ind., 505 N.E.2d 55; *Hudson v. State* (1986), Ind., 496 N.E.2d 1286. We see no reversible error in the admission of the above evidence.

[10–12] Appellant contends the trial court erred in allowing the rebuttal testimony of Roberta Heck. On rebuttal, she testified that she had reported to appellant that she had been raped but that he told her not to report it—that he would "get him (rapist) in his own time." He further stated to her that he was "going to break his (rapist) legs or something." Appellant claims this irrelevant testimony was highly prejudicial to his case. The scope of rebuttal evidence is within the trial court's discretion. *Stewart v. State* (1988), Ind., 531 N.E.2d 1146. Evidence which explains, contradicts, or disproves the adversary's evidence may be competent rebuttal evidence. *Buchanan v. State* (1975), 263 Ind. 360, 332 N.E.2d 213.

In the case at bar, appellant attempted to intimate that someone else, such as his daughter Roberta, had been responsible for the death of the decedent. In pursuing this claim, he presented evidence attempting to show that the relationship between the decedent and Roberta had been turbulent. In his direct testimony, he claimed that Roberta had been involved in an argument and a fight with a man named Luther Thompson, who, he claimed Roberta said, had raped her. He further stated that he had told Roberta to go to the police but that his wife had told her it was her own fault.

In raising such an issue, appellant opened the door for Roberta's rebuttal testimony to state her version of what had happened when she reported the rape to her parents. We see no error in the admission of Roberta's rebuttal testimony.

[13, 14] Appellant claims the court abused its discretion when, upon learning that the order for separation of witnesses had been violated, it allowed testimony from witnesses who had violated the separation order. Where there has been a violation of a separation order, the trial court, in the absence of connivance or collusion by the party calling the witness, may permit the witness to testify. *Cox v. State* (1981), 275 Ind. 636, 419 N.E.2d 737; *O'Conner v. State* (1980), 272 Ind. 460, 399 N.E.2d 364. The trial court's decision on such a matter will not be reversed absent an abuse of discretion. *Buchanan, supra.*

In the case at bar, appellant makes no claim that the prosecutor in any way connived to have the witnesses violate the separation order. In fact, the prosecutor observed that it was not known that these witnesses, after their initial testimony, would be recalled to the stand and that he only learned of such a necessity after appellant had presented unanticipated evidence which required the rebuttal testimony of the witnesses who had violated the order following their initial testimony. Under the circumstances, we see no reversible error in permitting these witnesses to testify.

[15, 16] Appellant contends the trial court erred in admitting State's Exhibits Nos. 2, 3, 101, and 105. Appellant acknowledges that the trial court has broad discretion in ruling on the admissibility of evidence and will be reversed only for a clear abuse of discretion. *Jackson v. State* (1986), Ind., 490 N.E.2d 1115. However, he claims that in the case at bar the questioned evidence was inadmissible because its prejudicial impact outweighed its probative value, citing *Rust v. Guinn* (1981), Ind.App., 429 N.E.2d 299. Exhibits 2 and 3 were taped interviews of appellant by the police. Neither tape included a confession. Appellant claims they thus were inadmissible because they were simply hearsay statements made by appellant and neither tape had any logical tendency to prove a material fact.

First, the State correctly observes that there is no hearsay problem in this issue because appellant testified at trial and was subject to examination on the evidence. *See Washburn v. State* (1986), Ind., 499 N.E.2d 264. As to the relevancy of his statements, appellant had filed an alibi notice in which he claimed to have been at the home of his son at the time the murder was believed to have taken place. The statements appellant made in these interviews concerned his whereabouts on the night of the homicide. Evidence is relevant if it tends to prove or disprove any material fact. *See Mengon v. State* (1987), Ind., 505

N.E.2d 788. Under the circumstances, we see no error in admitting State's Exhibits Nos. 2 and 3 into evidence.

[17] State's Exhibit No. 101 is a certified copy of a petition for dissolution of the marriage between appellant and the victim. Appellant claims the State introduced the petition for the sole purpose of having the jury see that a restraining order against him was issued from the divorce court. He claims that such evidence is clearly inadmissible because its prejudicial impact outweighs its probative value, citing *Rust, supra.* Appellant claims, without citing authority, that to place before the jury the fact that a restraining order had been issued is improper. However, in the case at bar, there was an abundance of other evidence of prior abuse by appellant against the victim.

Even if we would assume *arguendo* that appellant's contention is correct and that a restraining order should not be placed before the jury, in the case at bar such evidence was merely cumulative and to only a minuscule degree. The evidence of the victim's prior abuse was overwhelming and the addition of the fact that a divorce court had issued a restraining order hardly could be expected to have any significant impact upon the decision of the jury. We see no reversible error in the admission of State's Exhibit No. 101.

[18] State's Exhibit No. 105 is a request for an initial hearing stating that appellant was arrested on a bench warrant on a battery charge which was not the subject matter of the case at bar. Again, there was admissible independent evidence that appellant was to come to trial on a charge of assaulting the victim and that he was to appear in court shortly after the time the victim disappeared. The fact that State's Exhibit 105 concerned that charge was merely repetitious of what the jury already had before it.

During cross-examination of Detective Kreinhop, appellant questioned him as to how many charges had been filed and questioned the delay in filing the charges. The State's presentation of its Exhibit 105 was a response by the prosecutor to explain the delay in filing the instant charge. It was entirely proper for the State to present evidence to explain the questions raised by the cross-examination of Detective Kreinhop. *Starks v. State* (1987), Ind., 517 N.E.2d 46; *Kalady v. State* (1984), Ind., 462 N.E.2d 1299. We see no reversible error in the admission of State's Exhibit No. 105.

[19] Appellant contends the trial court erred when it allowed the testimony of Officer Kreinhop regarding a telephone conversation and his actions after he heard the conversation. The officer testified to overhearing a conversation between appellant and his girlfriend, Shirley Slaughter. Appellant is apparently arguing that eavesdropping upon his conversation violated his Fourth Amendment rights and that any evidence and investigation resulting from the overhearing of the conversation should be suppressed.

At trial, however, appellant's objection was not based upon this Fourth Amendment claim. His objection at trial was that there was a discovery violation, both because he had not been apprised of any statement of his own made in the telephone conversation and because any statement by Shirley Slaughter was hearsay. We further would observe that the trial court sustained appellant's objection to the content of the conversation overheard by Detective Kreinhop. Testimony as to what the officer did after he heard the telephone conversation has been held to be proper evidence. *See Hester v. State* (1987), Ind., 512 N.E.2d 1110; *Boyd, supra.* We see no reversible error in permitting the officer to testify as to what avenue of investigation he pursued after hearing the telephone conversation.

The trial court is affirmed.

SHEPARD, C.J. and PIVARNIK, J., concur.

DeBRULER, J., dissents with separate opinion.

DICKSON, J., concurs in result without separate opinion.

DeBRULER, Justice, dissenting.

The same safeguards should be employed by the police forces in voice identification procedures as are employed in seeking visual or photographic identifications. *Matthews v. State* (1988), Ind., 518 N.E.2d 807. The admissibility of the products of such procedures is to be determined upon application of a two-pronged test, the first prong of which is the determination from a totality of the circumstances of whether the procedures are unduly and unnecessarily suggestive, and the second prong of which is whether, if so unduly and unnecessarily suggestive, there was created a substantial likelihood of irreparable misidentification. *Norris v. State* (1976), 265 Ind. 508, 356 N.E.2d 204. If a process fails the test and produces a tainted out-of-court identification by a witness, such witness may nevertheless make an in-court identification if that in-court identification does not depend upon the pre-trial one, but has an independent origin. *Id.*

Here, there is no evidence that the witness Standriff was previously acquainted with appellant's voice or that of the unidentified assailant before the night of the victim's disappearance. Her identification was very uncertain up to the point in time, one week before the trial, when she visited the police station. The voice which she did hear uttered only a few words. American English was not the mother tongue of the witness. She was from the Phillipines. She was not a victim, with attention fixed upon one who was attacking her, but simply a neighbor overhearing a neighborhood brouhaha. When, therefore, she came to the police station and asked to hear the suspect's recorded voice, and the police had such a recording, they were under a duty, the same as if the idea had been theirs, to present her with a fair voice identification array or lineup. *Matthews*, 518 N.E.2d 807. Under the totality of these circumstances, their failure to employ such a fair procedure created a very substantial likelihood of irreparable misidentification. The same set of circumstances indicate that there was no independant origin for her in-trial identification from a similar tape of appellant's voice. It was therefore constitutionally inadmissible. I would reverse and remand for a new trial at which such identification testimony would be excluded.

KEY NUMBER SYSTEM

Donald N. SCHWEITZER, Appellant,

v.

STATE of Indiana, Appellee.

No. 26S00-8811-CR-910.

Supreme Court of Indiana.

April 6, 1990.

Defendant was convicted in the Circuit Court, Gibson County, Walter H. Palmer, J., of attempted murder and criminal recklessness, and he appealed. The Supreme Court, Givan, J., held that: (1) trial court's instructions were proper; (2) evidence sustained rejection of plea of not guilty by reason of insanity; and (3) sentence was not excessive.

Affirmed.

Dickson, J., dissented.

1. Criminal Law ⇐829(3)

Court did not err in refusing defendant's tendered instruction as to the elements required to be proven to establish attempted murder where the court did give a correct statement of law in that regard.

2. Criminal Law ⇐829(9)

Trial court did not err in refusing defendant's instruction that jurors must accept inferences consistent with innocence if they found the facts of guilt or innocence equally probable, where the court's instructions, taken together, fully covered the contents of the tendered instruction.

DC 12 (Rev 8/82) **APPLICATION TO PROCEED IN FORMA PAUPERIS, SUPPORTING DOCUMENTATION & ORDER**

United States District Court	DISTRICT SOUTHERN OF INDIANA(NEW ALBANY DIVISI
CASE TITLE ROY HECK v. JAMES HUMPHREY,et al	DOCKET NO. NA 88-209-C MAGISTRATE CASE NO.

FILED
DEC 27 1988
JOHN A. [illegible]
CLERK

I, ROY HECK, declare that I am the (check appropriate box)

☒ petitioner/plaintiff ☐ movant (filing 28 U.S.C. 2255 motion)

☐ respondent/defendant ☐ other _____

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows: 42 U.S.C.1983,1985(2)1986,1988, ACTION FOR DEPRIVATION OF MY FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO BE FREE FROM AN ILLEGAL INVESTIGATION AND DUE PROCESS.

In further support of this application, I answer the following questions.

1. Are you presently employed? Yes ☐ No ☒
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)

   INCARCERATED INMATE/$13.00/MONTH

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   AUGUST 12,1986
   $800.00/MONTH

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or other form of self-employment Yes ☐ No ☒
   b. Rent payments, interest or dividends? Yes ☐ No ☒
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☒
   d. Gifts or inheritances? Yes ☐ No ☒
   e. Any other sources? Yes ☐ No ☒

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings account?
   Yes ☐ No ☒ (Include any funds in prison accounts.)
   If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ☐ No ☒
   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12/16/88 (Date) Gary Heck #874376 Signature of Applicant

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant herein has the sum of $ $29.16 on account to his credit at the _____ institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: _____

_____

_____

_____
Authorized Officer of Institution

ORDER OF COURT

The application is hereby denied

_____ _____
United States Judge *Date*

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

_____ _____
United States Judge or Magistrate *Date*

FORM TO BE USED BY PERSONS IN FILING A COMPLAINT PRO SE UNDER THE CIVIL RIGHTS ACT, 42 USC 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

NEW ALBANY DIVISION

ROY HECK

_____

_____

_____
(Enter here the full name of the plaintiff or plaintiffs in this action.)

COMPLAINT

v. **Civil No.** _____

JAMES HUMPHREY, DEARBORN COUNTY PROSECUTOR;
ROBERT EWBANK, ATTRONEY; AND MICHAEL KRINOPH,
INDIANA STATE POLICE INVESTIGATOR; ALL IN THIER OFFICIAL AND INDIVIDUAL CAPACITIES AS SUCH

_____
(Enter here the full name of the defendant or defendants in this action.)

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your claim?

YES ( ) NO (X)

B. If your answer to A is yes, describe the action in the space below. (If there is more than one action, describe the additional actions on the reverse side of this page).

1. Parties to the Action: _____
2. Court (if federal court, name the district; if state court name the county):

   _____
3. Docket number: _____
4. Name of judge who heard case: _____
5. Disposition (For example, was the case dismissed? Was it appealed? Is it still pending?)

   _____

If you are imprisoned in a state penal institution, then answer C: 1,2 and 3:

C. 1. Did you present this complaint to the state prison grievance procedure?

YES ( ) NO (X)

2. If your answer is yes, what was the result?

3. If your answer is no, please explain.

THIS IS NOT A PRISON MATTER

PARTIES

(Place your full name in the first blank in paragraph 1. In the second blank, place your present address. Do the same for additional plaintiffs, if any).

1. The plaintiff is ROY HECK #874376

WESTVILLE CORRECTIONAL CENTER,WESTVILLE,INDIANA 46391

2. Plaintiff's address (and prison number) is:

SEE ABOVE

CAUSE OF ACTION

D. I allege that the following of my constitutional rights, privileges or immunities have been violated:

Allegation 1: DEFENDANTS JAMES HUMPHREY,ROBERT EWBANK,AND MICHAEL KRINOPH,ACTING UNDER COLOR OF STATE LAW,CONSPIRED AND/OR ACTED IN CONCERT WITH A MEETING OF THE MIND TO SUBJECT PLAINTIFF HECK TO AN ILLEGAL INVESTIGATION IN VIOLATION OF THE FOURTH,AND FOURTEENTH AMENDMENTS TO THE U.S.CONSTITUTION,AND 42 U.S.C.1983,1985(2),1986, [redacted] 2: AND 1988.

[redacted] 3:

E. The following facts form the basis for allegations listed above in D. (Include all of the facts you consider important, and state them clearly and in your own words - but do NOT make legal arguments or citations).

Allegation 1:

"SEE ATTACHED SHEET FOR FACTS IN SUPPORT"

Allegation 2:

Allegation 3:

(If you need more space to explain any allegation or to list additional facts, use the other side of this sheet, or attach an additional sheet.)

REQUEST FOR RELIEF

1. I DO (do, do not) request that I be allowed to commence this action without prepayment of fees and costs, or security therefore, pursuant to 28 U.S.C. 1915. The affidavit of indigency below has been completed and is submitted in support of this request for leave to proceed in forma pauperis.

SUPPORTING FACTS TO MY ALLEGATION AGAINST DEFENDANTS JAMES HUMPHREY,ROBERT EWBANK, AND MICHAEL KRINOPH.

BETWEEN MAY AND JULY,1987:

1. DEFENDANTS HUMPHREY,EWBANK,AND KRINOPH,AFTER CONDUCTING A SEARCH IN 1986 OF MY DESEASED WIFE'S TRAILOR HOME,TOOK ITEMS FROM HER RELATIVES AND USED THEM IN THEIR UNLAWFUL,UNREASONABLE,AND ARBITRARY INVESTIGATION OF ME BECAUSE THEY,TOGETHER THROUGH AGREEMENT, UNDERSTANDING,AND CONTROL BELIEVED ME TO BE RESPONSIBLE FOR HER DEATH.

2. THEY ALSO ARBITRARILY,UNLAWFULLY,UNREASONABLY AND KNOWINGLY DESTROYED CLOTHING FROM MY DESEASED WIFE'S BODY WHICH WAS EXCULPATORY IN NATURE AND COULD HAVE PROVED MY INNOCCENCE OF THIS CRIME.

3. THESE NAMED DEFENDANTS DIRECTED IN CONCERT WITH A MUTUAL UNDERSTANDING AND AGREEMENT AN ILLEGAL AND UNLAWFUL VIOCE IDENTIFICATION PROCEDURE (3)TIMES WITH A POTENTIAL STATE WITNESS,WITHOUT MY OR MY ATTORNEY'S PRESENCE TO FURTHER THE OBJECTIVES OF SAID CONSPIRACY AGAINST ME.

4. ALL OF THE DEFENDANTS ACTIONS WERE PRELIMINARY POLICE INVESTIGATIVE ACTIVITY TO GATHER EVIDENCE ILLEGALLY AND BY ANY MEANS NECESSARY TO CHARGE ME WITH THE CRIME OF KILLING MY WIFE.

5. AT ALL TIMES DURING THIS UNLAWFUL,UNREASONABLE, AND ARBITRARY INVESTIGATION THE DEFENDANTS KNEW PLAINTIFF HAD CLEARLY ESTABLISHED U.S.CONSTITUTIONAL AND STATUTORY RIGHTS TO BE FREE FROM THIS TYPE OF ILLEGAL CONDUCT BY PUBLIC OFFICIALS YET THEY OVERRIDED THEM IN CONCERT.

6. BOTH THE DEFENDANTS HUMPHREY AND EWBANK,EVEN THOUGH COUNTY PROSECUTORS AT SAID TIME,WERE ACTING AS "POLICE INVESTIGATORS",AND NOT FUNCTIONING IN THEIR QUASI-JUDICIAL CAPACITIES AGAINST THE PLAINTIFF.

7. ALL OF THE NAMED DEFENDANTS HAD PRIOR KNOWLEDGE OF THE WRONGS CONSPIRED TO BE DONE AGAINST THE PLAINTIFF,AND HAVING POWER TO PREVENT OR AID IN THE PREVENTING THE COMMISSION OF SAME,NEGLECTED OR REFUSED TO DO ANYTHING TO PREVENT THE PLAINTIFF'S CIVIL RIGHTS FROM BEING VIOLATED.

2. I believe that I am entitled to the following relief:

SEE ATTACHED COPY

Roy Heck #874376
(Signature)

P.O. BOX 473

Westville Ind. 46391
(Address)

AFFIDAVIT

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

Before me the undersigned in and for the said county and state presently appeared ROY HECK, plaintiff in the within action who, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing complaint are true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

Roy Heck #874376
(Signature of affiant-plaintiff)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 21 DAY OF December, 1988.

Robert J. Bulak
Notary Public or other person authorized by law to administer oaths.

ROBERT J BULAK
NOTARY PUBLIC STATE OF INDIANA
LA PORTE COUNTY
MY COMMISSION EXP. MAR 9 1992

PLAINTIFF BELIEVES HE IS ENTITLED TO THE FOLLOWING RELIEF:

A) A DECLARATORY JUDGEMENT PURUANT TO 28 U.S.C.A.2201-2202, DECLARING WHETHER OR NOT DEFENDANTS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS NOT TO BE SUBJECT TO AN ILLEGAL CRIMINAL INVESTIGATION.

B) COMPENSATION IN THE AMOUNT OF $300,000.00, FROM EACH NAMED DEFENDANT FOR VIOLATING PLAINTIFF'S CIVIL RIGHTS AND HIS LOSSES INCURED FROM HIS EMPLYMENT AND FARM OPERATIONS.

C) PUNITIVE DAMAGES IN THE AMOUNT OF #300,000.00, FROM EACH NAMED DEFENDANT FOR VIOLATING PLAINTIFF'S CIVIL RIGHTS.

D) INTEREST AND COSTS INCURRED IN LITIGATING THIS ACTION IF PLAINTIFF SHOULD PREVAIL ON ANY OF HIS CLAIMS.

E) ATTORNEY FEES AWARD IF PLAINTIFF PREVAILS ON ANY OF HIS CLAIMS.

STATUTORY APPENDIX

42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1997e provides, in relevant part:

Applicability of administrative remedies

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under this paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

28 U.S.C. § 2254(b) provides:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.